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Supreme Court, U.S.
FILED

94 1859 MAY 11 1995

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1994

David Lee Powell, *Petitioner*

v.

State of Texas, *Respondent*

On Petition for a Writ of Certiorari to the Court of Criminal Appeals of Texas

PETITION FOR WRIT OF CERTIORARI

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May 1994

38 pp

QUESTIONS PRESENTED

1. Whether the State's use of psychiatric testimony ruled by this Court to have been unconstitutionally obtained violates this Court's mandateand the Fifth and Sixth Amendments, and denies due process of law.

2. Whether packing the trial court with police officers and other persons wearing badges and pro-prosecution signs, and then referring to this display during summations in an effort to influence the jury and the trial judge, violates due process and the Eighth Amendment, and whether such misconduct requires a new trial.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT	2
Facts	3
Psychiatric Testimony	5
Police Officers' Courtroom Demonstration	7
REASONS FOR GRANTING THE PETITION	7
1. This Court's Mandate Was Not Followed	7
2. The State Repeated the Constitutional Violation Condemned in *Powell II*	9
3. A "Lynch-Mob Atmosphere" Prevailed at a Critical Juncture of the Trial	11
CONCLUSION	12
APPENDIX A - Court of Criminal Appeals Opinion	1a
APPENDIX B - Denial of Rehearing	21a

TABLE OF AUTHORITIES

Page

Cases

Cooper v. Aaron, 358 U.S. 1 (1958).....10
Ellason v. State, 432 S.W.2d 955, 957 (Tex.Cr.App. 1968)..8
Estelle v. Smith, 451 U.S. 454 (1981).....10
Holbrook v. Flynn, 475 U.S. 560 (1986).....12
Honda Motor Co. v. Oberg, 114 S.Ct. 2331 (1994).....11-12
Irvin v. Dowd, 366 U.S. 717 (1961).....11
Moore v. Dempsey, 261 U.S. 86 (1923).....11
Powell v. State, 742 S.W.2d 353 (Tex.Crim.App. 1987)....2,3
Powell v. State, 767 S.W.2d 759 (Tex.Cr.App. 1989).....2
Powell v. State, 784 S.W.2d 934 (Tx.Crim.App. 1990).....2
Powell v. Texas, 487 U.S. 1230 (1988)[Powell I].....*passim*
Powell v. Texas, 492 U.S. 680 (1989)[Powell II].....*passim*
Satterwhite v. Texas, 486 U.S. 249 (1988).....2,10
Ex parte Sewell, 742 S.W.2d 393, (1987).....8,9
Sheppard v. Maxwell, 384 U.S. 333 (1966).....11
Tague v. Louisiana, 444 U.S. 469 (1980).....10
Turner v. Louisiana, 379 U.S. 466 (1965).....11
United States v. Yahweh, 779 F. Supp. 1342
(S.D. Fla. 1992).....12

Constitutional and Statutory Provisions:

U.S. Const., amend. 5.....*passim*
U.S. Const., amend. 6.....*passim*
U.S. Const, amend. 14.....*passim*
Tx. C.Crim.P. 37.071.....9
Tx. C. Crim.P. art. 44.29.....8,9
Tx. Pen.C. art. 19.02.....9
Tx. Pen.C. art. 19.03.....9

In the Supreme Court of the United States
OCTOBER TERM, 1994

David Lee Powell, *Petitioner*

v.

State of Texas, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

David Lee Powell respectfully petitions for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals in this case.

OPINION BELOW

The opinion of the Court of Criminal Appeals is not yet officially reported. It may be found at 1994 WL 679954 (Tex.Cr.App. 1994), and in the Appendix.

JURISDICTION

The Court of Criminal Appeals opinion and judgment were rendered December 7, 1994. The State's timely Motion for Rehearing was denied February 15, 1995. This Court has jurisdiction under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., amend. 5:
No person . . . shall be compelled in any criminal case to be a witness against himself . . . .

U.S. Const., amend. 6:
In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defence.

U.S. Const, amend. 14:
[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT

This case has been to this Court twice before. In *Powell v. Texas*, 487 U.S. 1230 (1988)[*Powell I*], the Court vacated the conviction[1] and remanded to the Texas Court of Criminal Appeals in light of *Satterwhite v. Texas*, 486 U.S. 249 (1988), because the State had caused Mr. Powell to be examined by a psychiatrist -- Dr. Richard Coons, M.D. -- on the day of his arrest, without the notice required by *Satterwhite*. The Court of Criminal Appeals, despite this error, adhered to its opinion affirming the conviction and sentence of death. 767 S.W.2d 759 (Tex.Cr.App. 1989). This Court, per curiam, "reverse[d] the judgment of the Court of Criminal Appeals." 492 U.S. 680 (1989)[*Powell II*] That Court, in obedience to this mandate, reversed and remanded for a new trial. 784 S.W.2d 934 (Tx.Crim.App. 1990)(Table).

At the new trial, the State again used the services and testimony of Dr. Coons, and again obtained a judgment of conviction and death. The Court of Criminal Appeals entered a judgment reversing and remanding, but left open under Texas law the possibility that petitioner will not receive a retrial on guilt but only on punishment. The Court of Criminal Appeals specifically noted its concern with the "lynch-mob atmosphere" at the punishment trial, and the "State's and trial court's disregard for legal precedent set by the Supreme Court" in using Dr. Coons' testimony,[2] but did

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[1] Vacating Powell v. State, 742 S.W.2d 353 (Tex. Cr. App. 1987).

[2] As the Court said, "Some of the unaddressed points of error are troubling in that they reflect a pattern by the State and trial court of disregard for certain basic constitutional principles. Points one and two, for example, complain of the lynch-mob atmosphere created by the single file entry into the court room of about eighty-five uniformed and armed police officers with mourning ribbon taped over their badges. It is

not expressly base its judgment upon these findings. The Court denied the State's timely motion for rehearing, in which the State disputed the factual and legal basis for these observations.

Powell is here because the judgment below did not grant him the full relief to which he was entitled -- an unequivocal order for a new trial. Resolution of this issue at this procedural hour would help to ensure the orderly and fair disposition of this case.

Facts

We summarize the facts briefly. A fuller account appears in the various opinions, e.g., 742 S.W.2d 353 (Tex.Crim.App. 1987).

The trial record revealed Powell's upbringing on a family farm in Texas, and the abrupt changes in his life that began during his student days at the University of Texas, Austin. Powell entered UT in 1968 as a scholarship student. The political and social turmoil on the campus contributed to changes in his political views, and thereafter to a pattern of drug use and clinical depression. From 1968 to 1977, successful attendance at school alternated with episodes of mental illness, drug use and petty crime. In 1977, one of his treating doctors prescribed a medication that caused Powell

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particularly unsettling that the demonstration was apparently orchestrated by the prosecuting attorney to give effect to his closing argument. Appellant complains that the defense's closing argument was made over the head of a police officer sitting on the floor within the bar because of the crowded condition of the court room. Similarly disturbing was the State's and trial court's disregard for legal precedent set by the Supreme Court of the United States in reversing appellant's prior capital murder conviction,--said precedent affecting the testimony of Dr. Coons as to punishment issues. We note that the disregard for the legislative mandates of Art. 37.071 poignantly reflects the pattern of escalating disregard for constitutional order on the part of the trial court and the State in appellant's case. Nowhere is the rule-of-law more important than in our courts, and our prosecuting and policing agencies." Slip op. at 11 n.7, Appendix, p. 19a.

to hallucinate and to have paranoid fantasies. During the 1970s, Powell had a relationship with Sheila Meinert, who was also a drug user.

Shortly after midnight on May 18, 1978, Powell was riding in a red Ford Mustang with Sheila Meinert and, apparently, another person whose identity has never been established. Meinert testified at trial that Mr. Powell had asked her to drive him to South Austin, and that he had with him a rifle, a pistol, a hand-grenade, radical literature, and drugs. Meinert testified that although Powell had been carrying drugs for months, she did not believe he was capable of shooting anyone.

Austin police officer Ralph Ablanedo stopped the car, apparently for a traffic violation. Meinert was driving. Meinert got out of the car. Officer Ablanedo talked with Meinert and radioed in for a check on her and on the car. Because Meinert did not have her driver's license, Officer Ablanedo asked for Mr. Powell's license as well. He then gave Meinert a citation and allowed her to drive away.

Shortly, the police dispatcher told Ablanedo that there was a "possible wanted" on Mr. Powell, so he chased the Mustang and signaled it to stop. Meinert got out of the car and walked towards Ablanedo. There was gunfire. Ablanedo fell, mortally wounded.

As he lay on the ground, Ablanedo said to the other officers who had arrived, "don't move me . . . that damn girl." Eduardo Segura, resident of a nearby apartment, came to help Ablanedo and asked him, "who did it?" Ablanedo replied it was "a girl." Another police officer claimed at petitioner's retrial that Ablanedo had also said, "*he* got me with a shotgun."

One witness said that petitioner was in the rear seat of the Mustang as the shots were fired, with another person in the driver's seat. After Ablanedo fell, Meinert got back in the Mustang, which was driven off. The other officers began a search of the neighborhood.

Within a short time, Austin police officer Villegas saw the Mustang in an apartment parking lot. He could only see two people in the car. Someone in the car fired at Villegas, who returned the fire. Other officers said that someone with long hair made a throwing motion towards the police, and that an unexploded hand grenade was found nearby. Meinert and petitioner both had long hair, and the officers could not make a positive identification. One officer said he thought Powell threw the grenade.

Meinert was arrested near the Mustang, and a cache of weapons was found. Several hours later, at dawn, a school patrolman found Mr. Powell under a bush at a nearby high school. Mr. Powell was arrested and offered no resistance. The third occupant of the Mustang has never been apprehended.

Psychiatric Testimony

At his first trial, Mr. Powell presented the defense that he had been insane on May 18, 1978, due largely to his use of psychoactive drugs such as amphetamines. The State countered this evidence with the testimony of Dr. Richard Coons, M.D., and a psychologist, Dr. George Parker. Dr. Coons had repeatedly examined Mr. Powell, on the State's motion, first made the morning of May 18, 1978. Drs. Coons and Parker also testified in the penalty phase of the first trial, on the issue of "future dangerousness." The constitutional violation there committed was the subject of *Powell v. Texas*, 492 U.S. 680 (1989).

On retrial, Mr. Powell was convicted of capital murder. The prosecution and defense sharply differed over the forensic evidence, and over the credibility of Ms. Meinert, who had received immunity and who was in a position to have been the "shooter." In its case-in-chief, the State introduced over objection items petitioner was carrying when he was arrested, including a piece of campaign literature for Court of Criminal Appeals Judge Sam Houston Clinton and an article about a punk rock singer who had

robbed a bank and escaped from prison. Given the publicity about petitioner's case, it was likely that some jurors would recall that Judge Clinton had twice voted to reverse petitioner's first conviction.

In the penalty phase of the trial, psychiatric testimony again played a large role -- at the State's initiation. The State presented, in his direct case, the testimony of Dr. Clay Griffith that Mr. Powell was dangerous and that drug use did not cause him to shoot a police officer.

The defense countered with testimony from Dr. Lester Grinspoon, author of a respected book entitled "The Speed Culture," on the effect of amphetamines. Dr. Richard Pesikoff testified -- based on 400 to 600 hours of research and interviews -- about Mr. Powell's addiction, and his rehabilitation in prison.

The State first raised the specter of Dr. Coons' unconstitutional 1978 examination of Mr. Powell by asking Dr. Pesikoff, over objection, if he knew of Coons' conclusions. Then, again over defense objection that specifically invoked this Court's opinion, the State introduced Dr. Coons' report from the prior trial as extrinsic evidence. This report had formed part of the very evidence that led to reversals in *Powell I* and *Powell II*.

More testimony followed, first from the well-known Dr. James Grigson, and then from experts who showed that Grigson's conclusions and methodology are flawed.

The State continued the battle of experts on rebuttal, and offered testimony from Dr. Wesley Wallace, yet another doctor who examined Mr. Powell just 12 hours after his arrest in 1978, in the presence of police officers, and without any warnings as to Powell's rights.

Continuing in its tactics, the State offered Dr. Coons in person, who testifed over objection to the interviews he had conducted with Mr. Powell in 1978. Prosecutors in summation repeatedly vouched for Dr. Coons' opinions, saying that Dr. Pesikoff had been paid, but that Dr. Coons

had conducted a *court-ordered* examination soon after the event, so -- as the prosecutor assured the jury "he's telling you the truth." This court-ordered examination was, of course, none other than the unconstitutional episode this Court denounced in *Powell II*.

Police Officers' Courtroom Demonstration

At closing argument in the punishment phase of trial, Austin police officers in uniform suddenly began to stream in to the small semicircular courtroom. They marched in single file as summations began. They passed around the metal detector. A woman from an office being used by the District Attorney placed a strip of purple tape over the badge of each officer as a sign of mourning. The parade continued until every seat the courtroom was filled, and then officers began to sit on the floor between defense counsel and the jury box. Civilian spectators in seats near the jury sported buttons and facsimile police badges saying "police pal" and "police buddy." Other police officers stood at the back of the courtroom, three deep.

The prosecutor made the most of this display in summation, with references to the need to "protect the badge." "I saw a poster once," the prosecutor intoned, "that had a picture of a badge with a piece of tape over it, and the caption reads, 'Officers give more than tickets.'"

The jury answered the special issues in the affirmative, and Mr. Powell was sentenced to death.

Surprised by the sudden influx of officers, with the jury in the box and summations about to begin, defense counsel nonetheless was able -- at the hearing on motion for new trial -- to make a record on the issue that led the Court of Criminal Appeals to conclude that a "lynch-mob atmosphere" prevailed.

REASONS FOR GRANTING THE PETITION

1. This Court's Mandate Was Not Followed

This petition is brought because the fundamental errors presented -- and in major part acknowledged by the Court of Criminal Appeals -- require the unequivocal grant of a new trial. The Court of Criminal Appeals sidestepped this issue, leaving open the prospect that petitioner would receive only a new hearing on sentence. It did so by invoking a statute that was not even in existence at the time of the offense -- Tex. C.Crim.Proc. art. 44.29(c), as amended in 1993 to provide that if any court

> sets aside or invalidates the sentence of a defendant convicted of an offense under Section 19.03 of the Penal Code on the basis of any error affecting punishment only, the court shall not set aside the conviction but rather shall commence a new punishment hearing as if a finding of guilt had been returned.[3]

The Court of Criminal Appeals has held under a closely related statute that the trial court will decide in the first instance whether an entire new trial shall be granted. *Ex parte Sewell*, 742 S.W.2d 393, 397 (1987), construing Tex. C. Crim.P. 44.29(b).

The Court of Criminal Appeals' action in leaving open the prospect that petitioner would not receive a new trial on guilt was wrong because under Texas law the jury's finding of guilt does not result in a judgment being entered -- the "trial" continues to another "stage". Under the statute applicable to petitioner's case, the jury is to decide at the second stage whether the "the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the

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[3] The statute as it stood when the alleged offense occurred required a new trial in case of reversible error at any phase of a bifurcated jury trial. See Ellason v State, 432 S.W.2d 955, 957 (Tex.Cr.App. 1968).

deceased or another would result." Tx. C.Crim.P. art. 37.071 (former provision). The jury's first-stage verdict establishes only that the defendant is guilty of "knowing" or "intentional" murder, Tx. P.C. art. 19.02(b)(1), and that the victim was a peace officer. Tx. P.C. art. 19.03(a)(1).

The Court need not, however, address this potential infirmity of art. 44.29(c).[4] The errors on which certiorari is sought infected this case root and branch. The jury's initial finding of guilt was not, and could not be, the subject of any judgment when the State began to violate this Court's mandate and use forbidden psychiatric testimony. The "lynch-mob atmosphere" created by the State was designed to affect and intimidate not only the jurors but the trial judge. The trial judge had not entered judgment on the jury's finding of guilt. A new trial motion going to the whole case could not be made until after the jury had answered the special issues on punishment, and the trial judge thus retained the power to make rulings affecting guilt as well as punishment. The trial judge was an elected official facing a contested race, and the packed courtroom was as much an effort to impress and affect his judgment as much as the jury's.

Thus, there is no principled way to slice up the errors shown by the record and found by the Court of Criminal Appeals, and deny their effect upon the entire judgment of guilt and sentence. This Court has jurisdiction because petitioner sought outright and unequivocal reversal and did not obtain that relief.

2. The State Repeated the Constitutional Violation Condemned in *Powell II*

This Court has made clear the State's obligation when a psychiatrist is sent to examine a capital defendant. The defendant has the right to counsel's "guiding hand" at

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[4] Indeed, given Texas law on when the issue would be raised, the question would not be open at this procedural hour. Ex parte Sewell, *supra*.

that critical stage. *Estelle v. Smith*, 451 U.S. 454 (1981); *Satterwhite v. Texas*, 486 U.S. 249 (1988). Dr. Coons conducted an examination of petitioner without giving notice that he would be concerned with future dangerousness and with the penalty phase of petitioner's trial.

This Court sharply rebuked the Texas authorities in reversing petitioner's conviction in *Powell II*, 492 U.S. 680 (1989). Those authorities -- prosecutorial and judicial -- were without lawful power to annul a judgment of this Court or to trifle with rights acquired under it. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

The State contended below that petitioner "opened the door" to Dr. Coons' testimony by putting on mental condition testimony in the penalty phase. This contention was rejected by this Court in *Powell II*. Moreover, the State began the mental condition debate at the penalty phase. The defense testimony that allegedly "opened the door" was in reality an effort to close a door that the prosecution had opened. Petitioner had a statutory, Tex. C.Crim.Proc. 37.071, and constitutional right to rebut the State's evidence, and should not be made to purchase that opportunity at the cost of his Sixth Amendment rights.

The State's Sixth Amendment violation was at this trial compounded by a Fifth Amendment error. At previous trials, Dr. Coons did not testify to giving petitioner any warnings before examining him in the jail. At this trial, however, without benefit of any contemporaneous notes, and in answer to leading questions, Dr. Coons said that he gave petitioner a "*Miranda*" warning. Dr. Coons did not testify to the content of this alleged warning, nor to any response that petitioner made to them. The warning did not meet the *Tague v. Louisiana*, 444 U.S. 469 (1980), standard.

3. A "Lynch-Mob Atmosphere" Prevailed at a Critical Juncture of the Trial[5]

The courtroom demonstration began and was conducted so as to maximize its impact, and to have its main focus behind defense counsel, whose attention was at that moment riveted on the jury box where his client's fate would be decided.[6] The trial judge, who was in the best position to see exactly what was happening, neither said nor did anything about the situation, and when confronted with the issue by a timely new trial motion denied relief.

No extensive discussion of this event should be necessary, nor need petitioner anticipate the State's arguments on this score. The Court of Criminal Appeals characterized the situation and adhered to its findings in the face of a petition for rehearing.

Mob rule and appeals for passion and vengeance have no place in trials -- civil or criminal. *Turner v. Louisiana*, 379 U.S. 466 (1965); *Irvin v. Dowd*, 366 U.S. 717 (1961); *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Moore v. Dempsey*, 261 U.S. 86 (1923). A civil trial so infected by prejudice would not be tolerated. See *Honda Motor Co. v.*

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[5] The State's studied and cynical disregard of elementary fairness is amply demonstrated on this record. For example, when petitioner was arrested, he had an item of Judge Sam Houston Clinton's campaign literature in his pocket, and a newspaper clipping about a punk rock singer who had robbed a bank and escaped from prison. These items had no probative value. They were admitted in evidence over objection. The campaign literature had an eerie significance in the context of this case. The case took place in the state capital, Austin, where the Court of Criminal Appeals sits and Judge Clinton lives. Judge Clinton, when in private practice, courageously defended unpopular defendants. Texas elects its judges, and Judge Clinton's votes to reverse appellant's earlier conviction -- a vote upheld by this Court -- were matters of public notoriety.

[6] The demonstration was precisely the kind of misconduct that puts defense counsel in an impossible position. Not only was it largely done behind counsel's back, the only possible objection at that moment would -- if sustained -- have resulted in the officers filing out the courtroom with their badges of mourning, in full view of the jury.

Oberg, 114 S.Ct. 2331 (1994). Courtroom security could not conceivably justify this show of force. Compare *Holbrook v. Flynn*, 475 U.S. 560 (1986). See also *United States v. Yahweh*, 779 F. Supp. 1342 (S.D. Fla. 1992)(barring spectator garb designed to show support for defendants).

CONCLUSION

For the foregoing reasons, petitioner prays that the writ of certiorari issue, and that the cause be remanded with directions to provide petitioner a complete and fair new trial.

Respectfully submitted,

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May 1994

APPENDIX A - COURT OF CRIMINAL APPEALS OPINION

David Lee POWELL, Appellant, v. The STATE of Texas, Appellee.

No. 71399.

Court of Criminal Appeals of Texas, En Banc.

Dec. 7, 1994.

MEYERS, Judge.

Upon retrial[1] in November 1991, appellant was convicted under Texas Penal Code s 19.03(a)(1) for the capital murder, committed on May 18, 1978, of a law enforcement officer. The jury affirmatively answered the two special issues submitted under Article 37.071(b)[2]. Appellant was sentenced to death as mandated by Article 37.071(e). Article 37.071(h) provides direct appeal to this court. We affirm appellant's conviction, but vacate and remand his sentence for further proceeding in accordance with Article 44.29(c).

Factual Summary

Appellant does not challenge the sufficiency of the evidence. However, a brief factual context is usually helpful.

On the night of May 17, 1978 appellant called Sheila Meinert, an ex- girlfriend, and in a slightly hysterical manner

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[1] Appellant was tried and convicted for the same offense and sentenced to death in 1978. On appeal we affirmed that conviction. Powell v. State, 742 S.W.2d 353 (Tex.Crim.App.1987). The United States Supreme Court on writ of certiorari vacated and remanded for further consideration. Powell v. Texas, 487 U.S. 1230, 108 S.Ct. 2891, 101 L.Ed.2d 926 (1988). On remand we again affirmed, Powell v. Texas, 767 S.W.2d 759 (Tex.Crim.App.1989), and again appellant's petition for writ of certiorari to the United States Supreme Court was granted. In Powell v. Texas, 492 U.S. 680, 109 S.Ct. 3146, 106 L.Ed.2d 551 (1989) appellant's conviction was reversed. The appeal before us today is from appellant's retrial, reconviction, and resentence of death.

[2] Hereinafter all article references are to the Texas Code of Criminal Procedure unless otherwise cited.

asked her to drive him to south Austin. As Meinert got into the driver's seat of appellant's Mustang, she noticed a machine gun on the back floor. Appellant also had a rifle, a pistol, a live hand-grenade, ammunition and a knapsack containing about 2.25 ounces of methamphetamine, literature about weapons and radical politics, and written accounts of his drug dealings.

A uniformed police officer in a marked car, Ralph Ablanedo, pulled appellant and Meinert over and asked for Meinert's driver's license. When she told him that she had lost it, he asked to see appellant's license and attempted to run a computer check. The dispatcher informed Officer Ablanedo that the computers were down. Ablanedo therefore issued Meinert a summons and allowed her and appellant to proceed.

Momentarily, the dispatcher informed Officer Ablanedo that there was possibly an outstanding theft warrant against appellant. Ablanedo pursued the Mustang in his patrol car and ordered Meinert to again pull over. Parking behind the Mustang, he exited the patrol car. As Meinert walked toward the car, shots were fired. Meinert ran back to the Mustang and drove off.

Bobby Bullard, a bystander, testified that Officer Ablanedo and Meinert were walking toward each other, when he heard two to four gunshots and saw Ablanedo fall. Ablanedo stood up but was downed by another round of gunfire. When Bullard looked at the Mustang, the back windshield was shattered, and appellant was inside the car holding a rifle and someone's head was visible below the dashboard in the driver's seat.

Appellant mortally wounded officer Ablanedo with ten gunshots to his chest, arm, abdomen, and leg.

Voir Dire

In his fifth point of error appellant alleges that the trial court erred in denying his timely motion to shuffle the jury. The State argues that appellant failed to obtain a ruling from

the trial court, and thus, has failed to preserve error. We agree; appellant has failed to preserve error. Not only is there no final ruling, but the record also fails to establish that appellant made a clear, unequivocal request for a jury shuffle. See Tex.R.App.P. 52(a).

According to the record defense counsel objected to the trial court's voir dire procedure. Objecting to the procedure, he stated: I had no idea you were going to be excusing jurors on the voir dire while we were--we haven't even had a chance to shuffle them yet. I would ask for a shuffle before we even start eliminating juror.... It was my understanding judge, so the record is clear, that you were going to do nothing more than to get them to fill out their information sheet and tell them to come back, and we could determine our shuffle after that. (XI, 57-58). These remarks, along with counsel's failure to pursue a final ruling, force us to conclude that either counsel did not actually motion for a shuffle or the trial court did not understand that defense counsel was requesting a shuffle. This type of ambiguity and misunderstanding is precisely what the requirement of a final ruling seeks to avoid.

To preserve error for review a defendant must receive an adverse ruling on his objection, and the ruling must be conclusory; that is, it must be clear from the record that the trial judge in fact overruled the defendant's objection; otherwise error is waived. See e.g. Ramirez v. State, 815 S.W.2d 636, 643 (Tex.Crim.App.1991) (citing Darty v. State, 709 S.W.2d 652 (Tex.Crim.App.1986) and Bailey v. State, 532 S.W.2d 316, 322 (Tex.Crim.App.1975)); Tex.R.App.P. 52(a). See also and compare Martinez v. State, 867 S.W.2d 30, 35 (Tex.Crim.App.1993), cert. denied, --- U.S. ----, 114 S.Ct. 2765, 129 L.Ed.2d 879 (1994); Chappell v. State, 850 S.W.2d 508, 510 (Tex.Crim.App.1993) (Court's granting State's motion for shuffle was final ruling on appellant's objection to shuffle). Having failed to make his request clear

and to obtain a final ruling, appellant has not preserved error for review. Appellant's fifth point of error is overruled.

In point of error Six, appellant avers that the trial court erred in denying his timely motion for a jury shuffle and then granting the State's untimely motion to shuffle the jury. Again we must agree with the State that no error was preserved.

The question of appellant's "request" for a jury shuffle has been disposed of in point of error five, supra. The record also reveals that defense counsel was offered and declined to shuffle the venire (XI, 294-95), and then failed to object when the trial court granted the State's motion for a shuffle. (XI, 298). Without a specific timely objection no error is preserved for review. See Martinez. v. State, 867 S.W.2d at 35; Chappell, 850 S.W.2d at 510; Tex.R.App.P. 52(a). Appellant's sixth point of error is overruled.

Appellant urges, in points of error seven and eight, that the trial court denied him the effective assistance of counsel and violated Article 35.17 by limiting the individual voir dire of fourteen venirepersons to Witherspoon issues. See Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). Appellant does not allege that the trial court completely denied him the individual voir dire of these veniremen, but merely that the trial court erred in forcing him to begin voir dire with questions about the veniremembers' attitudes toward the death penalty. Appellant asserts that the Texas Constitution and Article 35.17 guarantee that he be permitted to ask proper questions in any order he chose; he alleges this is crucial to voir dire strategy.

The State counters that the procedure employed by the trial court, limiting the initial voir dire to death qualification issues, is indistinguishable from the procedure upheld in Martinez, 867 S.W.2d at 35; see also Bernard v. State, 730 S.W.2d 703 (Tex.Crim.App.1987), cert. denied, 485 U.S. 929, 108 S.Ct. 1098, 99 L.Ed.2d 261 (1988).

In Martinez, we stated that questions about a veniremember's views regarding legal procedures and capital punishment are best addressed through individual voir dire. 867 S.W.2d at 35; see also Art. 35.17(2). But, we also emphasized that the conduct of voir dire rests within the sound discretion of the trial court, and only abuse of such discretion calls for reversal. Martinez, 867 S.W.2d at 35. We concluded that Article 35.17 does not in any way purport to restrict the discretion of the trial judge in conducting voir dire. Id.

In Martinez, veniremembers were summoned in panels and briefed on the capital sentencing scheme. The parties were then allowed to examine each individual concerning their attitudes regarding the death penalty. When a sufficient number of veniremembers was "death qualified" a general voir dire was conducted. After the general voir dire, the parties exercised their peremptory challenges and the jury was selected. Id. at 35.

In appellant's case it appears that the one-hundred-seventy-one prospective jurors were assigned to the trial court. This array was divided into two panels. The trial court began the voir dire of each panel by explaining general legal concepts such as the presumption of innocence. The judge then asked questions designed to evoke responses suggesting potential challenges for cause. In this vein the trial court explained the different attitudes towards the death sentence and the legal significance of each of the attitudes under Witherspoon and its progeny. The court then asked any veniremember inclined toward one of the attitudes described to raise his or her hand. Those who raised their hands were individually examined regarding the issue by each of the parties. The trial court did not require the parties to exercise any peremptory challenges based on this abbreviated examination; they were required only to make any challenges for cause based on the potential jurors' attitudes toward the death penalty.

Martinez is indistinguishable from appellant's case. The trial court in no way interfered with appellant's rights in its attempt to streamline the labyrinthical process of selecting a jury in a capital murder case.[3] The procedure employed by the trial judge in this case satisfies Article 35.17(2) and in no way interfered with appellant's right to counsel. How best to conduct voir dire remains a determination for the trial court, not appellant's voir dire strategies. Points of error seven and eight are overruled.

In point of error twenty-eight, appellant avers that the trial court erred in granting the State's challenge for cause against venireperson Hodgkins on grounds not specifically listed in Article 35.16. Appellant argues that Article 35.16 contains "an exclusive list" of all the grounds for removing a juror for cause.

In Allridge v. State, 850 S.W.2d 471, 484-485 (Tex.Crim.App.1991), cert. denied, --- U.S. ---, 114 S.Ct. 101, 126 L.Ed.2d 68 (1993), we held that A challenge for cause can properly be asserted on grounds which are not specifically enumerated in Article 35.16, where such a challenge is based on facts that show that the prospective juror would be 'incapable or unfit to serve on the jury.' These challenges, which are not based upon any ground specifically enumerated in the statutes are ordinarily addressed to the sound discretion of the trial judge. (citation omitted).

The record indicates that venireperson Hodgkins early in her individual voir dire informed the court of her extreme nervousness. (XVII, 1902). Noting that she was physically shaking, the court offered to excuse her, but appellant objected, requesting instead for the court to give her "soothing instructions" to calm her. (XVII, 1905). During

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[3] We note that appellant's brief is laden with conclusory arguments which assert theories of error but fail to show harm. For example, appellant does not explain how specifically the court's decision to limit voir dire interfered with his right to counsel. How was he harmed?

her examination, Ms. Hodgkins stated that she would "really rather not" serve on the jury but that she would survive emotionally and physically because she had survived "crisis-type situations" before. (XVIII, 1009-1010). Though she appeared to become more tranquil as her examination progressed, she stated that her nervousness might reappear during deliberations. She asserted that her health would not be adversely affected. The State challenged for cause under Article 35.16(a), appellant objected, but the court granted the State's challenge, explaining: [H]aving observed this witness' demeanor and conduct ... based upon the totality of the circumstances, of her statements concerning her conduct in the jury room and what it is doing to her physically, the court is not going to impose upon this citizen a duty of going through this trauma.... I am concerned about her well-being, having observed her. I brought it to counsel's attention.... (XVII, 1951-1952).

The facts of this case do not expose an abuse of the trial judge's great discretion in these matters which are best left to those experiencing them first-hand. See e.g., Cantu v. State, 842 S.W.2d 667, 681 (Tex.Crim.App.1992), cert. denied, --- U.S. ---, 113 S.Ct. 3046, 125 L.Ed.2d 731 (1993). A venireperson so traumatized by the experience of being called to jury duty that she is physically shaking, may be properly struck for cause as unfit under Article 35.16, despite her assurances that she will survive the "crisis." Appellant's twenty-eighth point of error is overruled.

Point twenty-nine voices appellant's contention that the court erred in sustaining the State's objection to a proper question during the examination of veniremember Aldridge.

According to the record, appellant's counsel explained the two special punishment issues to the veniremember and then explained that the judge would either give the jury a third mitigation issue or instruct the jurors to nullify one of the two special issues by voting "no" if they believed mitigating circumstances existed which justified life imprisonment

even if they believed the evidence was sufficient to reply affirmatively. The following ensued, giving rise to appellant's point of error: [Venireman Aldridge]: I'm not sure that I understand fully. I would never knowingly participate in killing another human being. And you're saying that to stand by that belief, I would have to lie about my responses to these two questions. [Appellant's counsel]: You're able to do that. [Venireman Aldridge]: I'm able to lie about it? [Appellant's Counsel]: Yes, on the third-- (XI, 103). The State's objection to the assertion that the veniremember could lie in his answer to the two special issues was sustained.

The right to ask proper questions does not include the right to misstate the law. See e.g. Zimmerman v. State, 860 S.W.2d 89, 96-7 (Tex.Crim.App.1993), vacated and remanded on other grounds, --- U.S. ----, 114 S.Ct. 374, 126 L.Ed.2d 324, and reaffirmed, 881 S.W.2d 360 (1994). When jurors are given a nullification instruction, they are not asked to lie; they are asked to give effect to their "well reasoned moral response" to mitigating evidence. Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). That is, they are asked to look beyond the fact that the evidence requires an affirmative answer, to consider whether some mitigating factors exists such that appellant should not be sentenced to death. If they find a mitigating circumstance, they are asked to give effect to their determination by answering one of the special issues negatively despite the evidence. Appellant's counsel misstated the law; he did not ask a question.

Moreover, appellant subsequently asked his question in a proper form without misstating the law.[4] This rendered harmless any error arising from appellant's not being

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[4] The record does not clearly reflect what appellant intended to ask after informing the venireman that he could lie. . The question asked immediately following the objection was whether the venireperson could vote "no" to the special issues to give effect to mitigating evidence.

permitted to ask the "question" in an improper form. See e.g. Trevino v. State, 815 S.W.2d 592, 604-5 (Tex.Crim.App.1991), reversed and remanded on other grounds, --- U.S. ---, 112 S.Ct. 1547, 118 L.Ed.2d 193 (1992), and reaffirmed 864 S.W.2d 499 (1993), cert. denied --- U.S. ---, 114 S.Ct. 1237, 127 L.Ed.2d 580 (1994). Appellant's twenty- ninth point of error is overruled.

In his thirtieth point of error, appellant complains that the trial court erred in overruling his objection to the State's informing veniremember Beasley that a sentence of life imprisonment does not mean that the accused will actually spend his life in prison. Again, the State's response, that error was not preserved, is supported by the record.

According to the record, the State informed Beasley that life imprisonment did not necessarily mean life imprisonment. When appellant's counsel objected, Beasley was removed from the courtroom. The trial court then reminded both parties that they had agreed not to discuss the issue of parole. The State then noted that the Defense had introduced the issue and that they felt it necessary to clarify any misperceptions created by defense counsel's statements. Judge Jones responded that he understood, and defense counsel added, "I understood, too." (XIII, 2198). There appears in the record no final ruling on the matter; Defense counsel did not press the objection. When the State resumed voir dire, no objection was made to the State's informing Beasley that "life without parole" is not an option in Texas. Furthermore, defense counsel subsequently accepted Ms. Beasley as a juror without objection. We are forced to conclude that appellant abandoned his objection.

Without a final ruling to his objection, appellant has not preserved error for review. See e.g. Ramirez v. State, 815 S.W.2d at 643; Tex.R.App.Pro. 52(a). Moreover, in accepting the veniremember as a juror without objection, we

are forced to conclude that defense counsel must have been satisfied that the alleged error was harmless or cured.[5]

Appellant's thirtieth point of error is overruled.

Pre-trial

Appellant's thirty-first point alleges that the trial court violated the mandate of Article 46.02 in appointing Dr. Richard Coons to examine appellant for competency and insanity even though he had testified against appellant at his first trial. Article 46.02 requires the appointment of "disinterested" experts to make such examinations.

Pursuant to appellant's notice of intent to present an insanity defense in the cause now under review, the State filed a motion requesting the appointment of Coons to examine appellant. The trial court granted the motion. At a pretrial hearing appellant asserted that Coons was not a disinterested party because he had testified at appellant's first trial. The trial judge declined to appoint another psychiatrist and ordered counsel not to interfere with Coons'

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[5] The situation is analogous to those where a wrongly denied challenge for cause is not preserved unless the venireman is peremptorily struck, appellant exhausts his peremptories, and additional curative peremptory challenges are denied. The harm in this instance is that the veniremember is exposed to an alleged incorrect statement of the law. If appellant subsequently accepts the veniremember without at least a renewed objection, we must presume that the venireman has subsequent to the misstatement of law, proven acceptable to the appellant. See Teague v. State, 864 S.W.2d 505, 512 (Tex.Crim.App.1993) (Defendant waived objection to State's challenge for cause in failing to object to venireman's excusal); Kemp v. State, 846 S.W.2d 289, 301 (Tex.Crim.App.1992) cert. denied, --- U.S. ----, 113 S.Ct. 2361, 124 L.Ed.2d 268 (1993) (improper excusal for cause not preserved for review where appellant never clearly informed trial court that he was resisting the State's challenge); Lopez v. State, 152 Tex.Crim. 562, 216 S.W.2d 183, 185 (1948) (appellant waived error in overruled challenge for cause by accepting juror without peremptorily striking him); Lilly v. State, 130 Tex.Crim. 600, 95 S.W.2d 703 (1936) (in accepting juror without objection or challenge, appellant waived any error in seating veniremen who had sat on appellant's jury in prior conviction).

examination. Appellant withdrew his notice of intent to raise the insanity defense. Appellant later confirmed the withdrawal of the insanity defense. Dr. Pesikoff testified at punishment for the defense that appellant was not legally insane at the time of the offense.

In Sterling v. State, 800 S.W.2d 513, 521 (Tex.Crim.App.1990), cert. denied, 501 U.S. 1213, 111 S.Ct. 2816, 115 L.Ed.2d 988 (1991), the appellant claimed that the professional staff of Rusk State Hospital, because employed by the State, could not be "disinterested experts" within the meaning of Article 46.02. Stating that the qualification of expert witnesses is a determination which rests within the discretion of the trial court and not be disturbed absent clear abuse, we held that Sterling had failed to establish such an abuse. The fact that a psychiatrist works for the State does not alone establish that he is biased. Id. See also Von Byrd v. State, 569 S.W.2d 883, 895-7 (Tex.Crim.App.1978), cert. denied, 441 U.S. 967, 99 S.Ct. 2418, 60 L.Ed.2d 1073 (1979).

Similarly, in the case at bar, no abuse of discretion has been established. Appellant fails to put forth any argument much less evidence showing that Coons was actually biased. Appellant argues that Dr. Coons in testifying at appellant's first trial became an agent of the State. Appellant cites Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981). While it is true that Coons was for purposes of Sixth Amendment analysis found to be an agent of the State, it does not follow that he cannot be a "disinterested witness" for purposes of Article 46.02. That Coons is required by the Sixth Amendment to provide a defendant with notice as to the scope of a psychiatric examination does not render him either interested or disinterested.

Appellant also argues that Coons could not be "disinterested" at appellant's retrial because he had testified against appellant at the first trial. The fact that Coons testified against appellant fourteen years ago does not alone

establish that he was or is biased against appellant. Some evidence of bias is required. We reject appellant's argument that if an expert has reached a conclusion unfavorable to him and so testified, the expert is as a matter of law biased.

Without evidence that he was actually biased against appellant, we cannot find that the court abused its discretion in appointing Dr. Coons to examine appellant. Appellant's thirty-first point of error is overruled.

III. Sentencing Trial

Appellant alleges in his eleventh point of error that the trial court erred in its charge to the jury, in accepting an incomplete and illegal verdict, and in sentencing appellant to death without the authority to do so. Appellant explains that the trial court failed to submit to the jury the "deliberateness" special issue required by the version of Art. 37.071(b)(1) applicable to his case. He further explains that since the jury never answered the requisite special issue, the verdict was incomplete and illegal. Appellant also argues that the sentence of death is not authorized, because the "deliberateness" issue was not answered.

Appellant is correct. The charge submitted to the jury, and therefore the verdict returned and the sentence imposed in his case were contrary to the mandate of the legislature as expressed in Article 37.071's effective dates. See, Tex.S.B. 880, Sec. 5., 72nd Leg., R.S. (1991) V.T.S.L.S. Chapter 838. The oversight of the trial court in submitting, and the State in failing to object to, the incorrect punishment charge was perhaps due to the then recent amendments to Article 37.071. As reflected in both the official and unofficial versions of the Texas Code of Criminal Procedure in circulation at the time of appellant's trial, November 1991, Article 37.071 had been amended by Senate Bill No 880. Section 1 of the bill deleted the "deliberateness" special issue and added the "anti-parties" special issue. See Tex.S.B. 880, 72nd Leg., R.S. (1991) V.T.S.L.S. Chapter 838. Section 5 of

the bill, also reflected in the circulating versions of the Code of Criminal Procedure, unequivocally stated:

(a) The effective date of this Act is September 1, 1991, and the change in law made by this Act applies only to an offense that is committed on or after September 1, 1991.

* * *

(b) An offense before the effective date of this Act is covered by the law in effect when the offense was committed, and the former law is continued in effect for this purpose. (Emphasis added). The mandate of the legislature is unequivocal. Not only did the legislature mandate that the amendments were only effective for offenses committed "on or after September 1, 1991," but the legislature also specifically mandated that for offenses committed prior to September 1, 1991 the version of Article 37.071 in effect on the date of the offense would apply.

Thus, the special issues to be asked in appellant's punishment charge were those in effect at the time of the offense, May 1978. In May 1978, Article 37.071 in pertinent part required: (b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury: (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result; (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and ... (c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of 'yes' or 'no' on each issue submitted.... (e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. (emphasis added). By statutory mandate, the trial court was required in appellant's case to submit the "deliberateness" issue to the jury, the jury was required to return a verdict which addressed the "deliberateness" issue, and the sentence

of death could not be pronounced without an affirmative answer to the "deliberateness" question. Yet, appellant's jury was not charged with the issue and therefore did not return an answer to it.

According to the record, it was at appellant's request that the trial court did not submit the "deliberateness" issue in the punishment charge. At appellant's request the trial court submitted instead the "anti-parties" special issue as appeared in the amendments to Article 37.071 not in effect for appellant's case. The State failed to object to the substitution.

On appeal, the State argues that appellant cannot now complain because the improper jury charge was altered and submitted at his own request. The State cites Livingston v. State, 739 S.W.2d 311, 341 (Tex.Crim.App.1987), cert. denied, 487 U.S. 1210, 108 S.Ct. 2858, 101 L.Ed.2d 895 (1988). But, in Livingston the capital murder defendant had requested, in addition to the mandatory special issue, the submission of the third "provocation" special issue, which is mandatory only if there is evidence of provocation by the victim. See Art. 37.071(b)(3). We held that Livingston could not complain about the improper submission of "provocation" special issue, explaining: Error, if any, was initiated by and was to the benefit of appellant. It is a long-standing rule that a defendant may not request a charge and when that charge is given as requested complain on appeal of any error. Appellant's case is distinguishable. Livingston dealt with inclusion of a gratuitous special issue, not the exclusion of a statutorily required issue. Appellant's question is more complex.

Though some precedents are strongly analogous to appellant's point of error, it seems that the question presented is one of first impression; whether the effective dates of statutes, mandated by the legislature may be waived or forfeited by capital murder defendants? It is a question of law, and since questions of law are the province of trial

courts, the specific question is whether a trial court may ignore an unequivocal, legislatively mandated effect dates of Article 37.071, even when at a capital murder defendant's behest. For the following reasons, we hold that a defendant may not waive and a trial court cannot ignore the effective dates of Article 37.071.

There are three types of rules in our legal system: 1) Absolute requirements and prohibitions which cannot be waived or forfeited; 2) rights of litigants which must be implemented unless affirmatively waived; and 3) rights of litigants which are implemented upon request and can be forfeited by a failure to invoke them. Ex parte Sims, 868 S.W.2d 803, 804 (Tex.Crim.App.1993), citing Marin v. State, 851 S.W.2d 275, 279-80 (Tex.Crim.App.1993).

The effective dates of statutes are absolute requirements. Absolute requirements and prohibitions are independent of the litigants' wishes. Marin, 851 S.W.2d at 279. The implementation of these absolute requirements and prohibitions is not optional and is therefore, neither waivable nor forfeitable by any party. Id. In Marin we noted that the jurisdiction of the courts is the clearest example of such absolute systemic requirements and prohibitions. Id. As we noted in Marin, even if he consents, a defendant may not be tried in a County Court at Law for a felony offense. Id., citing e.g., Garcia v. Dial, 596 S.W.2d 524, 527 (Tex.Crim.App.1980). Besides jurisdiction, we can think of no less optional a requirement than the "effective date" of a statute.

As jurisdiction empowers courts, effective dates empower legislation. The meaning of the word effective, according to Webster's Ninth Collegiate Dictionary is "to cause to come into being." In criminal matters the existence and elements of an offense are governed by the effective date of the legislation. If the effective dates of Article 37.071 are taken seriously, appellant was sentenced to death under a nonextant version of 37.071. Neither a trial court nor a

criminal defendant may bring into being a statute, especially not against the explicit will of the legislature.

In the case of Art. 37.071, its effective dates define offense. This is so because the effective dates determine what elements a jury must find to establish a capital murder punishable by death. In appellant's case the defining power of effective dates is especially poignant; at the time of the offense, May 1978, Article 37.071 required that a jury find, beyond a reasonable doubt, that appellant committed murder with "deliberateness" before he could be sentenced to death. Thus, through the effective dates of Article 37.071 the legislature defined a capital murder punishable by death as including the element of "deliberateness" at the time appellant committed the offense.

In the sense then that the effective dates define what constituted capital murder punishable by death on a given date, it is analogous to statutory definitions. We have held that statutory definitions may not be altered even at the request of criminal defendants. They are absolute requirements. See Casias v. State, 503 S.W.2d 262, 263 (Tex.Crim.App.1973) (Defendant executed sworn waiver of his right to be present at sentencing; sentence voided due as violation of Art. 42.02 defining sentence as "made is the presence of defendant").

In so far as the sentencing procedure and sentence of death imposed in appellant's case were not authorized by the legislature, and indeed, are in conflict with the legislature's explicit mandate, appellant's case is analogous to those cases addressing the waiver of statutorily required sentences and sentencing procedures.

Recently, in Ex parte Sims the issue presented was whether a defendant could affirmatively waive concurrent sentences when found guilty of more than one offense arising out of the same criminal episode prosecuted in a single criminal action, or whether the prohibition against consecutive sentences in section 3.03 of the Texas Penal

Code is absolute and not subject even to affirmative waiver. Noting the well established principle that a defendant may not by agreement render legal a punishment which is not otherwise authorized by law, we held: This language [of s 3.03] creates an absolute restriction of a trial court's general authority to impose consecutive sentences similar to the restrictions Article 42.12, Sec. 3g(a), V.A.C.C.P. places on a trial court's general authority to grant probation, ... An absolute requirement or prohibition may not be lawfully avoided, even with partisan consent. Marin, 851 S.W.2d at 280. Accordingly, Applicant was not able to consent to imposition of consecutive sentences, and entry of the cumulation order was not authorized, notwithstanding the terms of the plea agreement. Id. (emphasis added). In the case at bar the legislative mandate is also clear. Before the sentence of death can be imposed upon appellant a jury must affirmatively determine that appellant's lethal conduct was "deliberate." Art. 37.071(b). Just as Sims could not consent to the imposition of a sentence not authorized by law, appellant could not consent to a sentence of death that was not authorized, and in fact, is contrary to the statutory mandate. See also Casias, 503 S.W.2d at 263 (Defendant may not waive requirement that he be present at sentencing).

We have also held the legislature's prescribed procedures in Article 37.071 are mandatory and may not be waived. In Sorola v. State, 693 S.W.2d 417, 418 (Tex.Crim.App.1985), for example, both parties agreed that because the State had waived the death penalty, the proper procedure was to have the court assess punishment; the trial court consented and sentenced Sorola to life imprisonment. We reversed, holding that trial courts, with or without the consent of the parties, are not free to ignore the mandatory procedures set forth in Article 37.071. See also, 37.071; Ex parte McKinney, 688 S.W.2d 559 (Tex.Crim.App.1985); Ex parte Bailey, 626 S.W.2d 741 (Tex.Crim.App.1981); Ex parte Jackson, 606 S.W.2d 934 (Tex.Crim.App.1980); Eads v.

State, 598 S.W.2d 304 (Tex.Crim.App.1980); Ex parte Dowden, 580 S.W.2d 364 (Tex.Crim.App.1979); Batten v. State, 533 S.W.2d 788 (Tex.Crim.App.1976).[6]

In Marin v. State, 851 S.W.2d 275 (Tex.Crim.App.1993), we recognized that "the system ... includes a number of requirements and prohibitions which are essentially independent of the litigants' wishes." Id., at 279. Besides the jurisdiction of courts, we can think of no clearer example of this type of requirement or prohibition than the "effective date" of statutes. We cannot allow trial courts and criminal defendants to mutually consent to usurp the powers of the legislature. Thus, we must affirm the principle of absolute requirements and prohibitions which are not optional, waivable, or forfeitable, stating that neither a capital murder defendant nor a trial court may ignore the statutory scheme mandated by the effective dates of Article 37.071. The effective dates of statutes are absolute requirements, nonwaivable and nonforfeitable; criminal defendants may not in Texas legislate the law to be applied in their case.

We hold that the trial court erred in ignoring the mandated effective dates of Article 37.071 in favor of the scheme requested by appellant. We must also hold that the

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[6] Sorola relied on the principle that a capital murder defendant may not waive a jury trial. Here too precedent is analogous to the question raised by appellant's case. In Eads v. State, 598 S.W.2d 304, 307 (Tex.Crim.App.1980), we reversed the life sentence imposed on a capital murder defendant where the jury returned a negative verdict on the provocation special issue, but had failed to answer the first two special issues. We held that the accepting of the incomplete verdict and imposing a sentence on the verdict was tantamount to the court answering "no" to one of the special issues left unanswered by the jury, thus denying Eads a jury trial. Since the trial judge in appellant's case could not enter a sentence of death unless the jury affirmatively answered the issue of deliberateness, in imposing the death sentence he effectively provided an answer to that issue himself. Thus, the imposition of a sentence of death in appellant's case is analogous to the waiver of a jury punishment trial, which we have repeatedly held is not within the powers of one accused of capital murder.

verdict is incomplete since it did not answer the required "deliberateness" special issue. The sentence of death is likewise tainted; Art. 37.071(e) required an affirmative answer to the "deliberateness" issue before a sentence of death could be imposed. Appellant's eleventh point of error is sustained.

In light of our holding, the remaining points of error arising from and affecting only the punishment stage of appellant's trial, none of which challenge the sufficiency of the evidence, are dismissed as moot.[7]

Under the mandate of Article 44.251, we must vacate appellant's sentence of death and remand to the district court for further proceeding in accordance with the dictates of Article 44.29(c).

McCORMICK, P.J., and MILLER and WHITE JJ, dissent.

CAMPBELL, J., not participating.

CLINTON, Judge, concurring.

I join the Court's opinion in this cause, but write separately to add a qualification to its treatment of

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[7] Some of the unaddressed points of error are troubling in that they reflect a pattern by the State and trial court of disregard for certain basic constitutional principles. Points one and two, for example, complain of the lynch-mob atmosphere created by the single file entry into the court room of about eighty-five uniformed and armed police officers with mourning ribbon taped over their badges. It is particularly unsettling that the demonstration was apparently orchestrated by the prosecuting attorney to give effect to his closing argument. Appellant complains that the defense's closing argument was made over the head of a police officer sitting on the floor within the bar because of the crowded condition of the court room. Similarly disturbing was the State's and trial court's disregard for legal precedent set by the Supreme Court of the United States in reversing appellant's prior capital murder conviction,--said precedent affecting the testimony of Dr. Coons as to punishment issues. We note that the disregard for the legislative mandates of Art. 37.071 poignantly reflects the pattern of escalating disregard for constitutional order on the part of the trial court and the State in appellant's case. Nowhere is the rule-of-law more important than in our courts, and our prosecuting and policing agencies.

appellant's eleventh point of error. The Court's opinion frames the issue as whether the "effective dates of statutes are absolute requirements." Op. at p. ---. I believe this to be a subtle but significant distortion of the true issue in this cause.

What statutory provision controls at any given time is simply a matter of statutory construction. By its terms, the 1991 legislative amendment to Article 37.071 was made to apply only to offenses committed after its September 1, 1991 effective date. See Acts 1991, ch. 838, s 5, p. 2901, eff. Sept. 1, 1991. For any capital offense committed before September 1, 1991, the law at the time of appellant's trial required an affirmative finding of "deliberateness" by the jury before the trial court was authorized to sentence the accused to death.* Under Article 1.14(a), V.A.C.C.P., a capital accused against whom the State seeks imposition of the death penalty is not permitted by the system to waive a jury trial. I take this to mean that a jury finding on every issue the law assigns the jury to decide is an absolute feature of the system, not optional with the parties. Marin v. State, 851 S.W.2d 275 (Tex.Cr.App.1993). That appellant himself requested to be tried under the new punishment regime, therefore, cannot serve as either a forfeiture or even an express waiver of the requirement that a finding of deliberateness be made prerequisite to a lawful sentence of death. The law applicable to this appellant simply prohibits a judgment that includes a sentence of death in the absence of a jury finding of "deliberateness," and the trial court erred to enter such a judgment. Such error need not be preserved for appeal. Marin v. State, supra.

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* Appellant was tried in November of 1991, and thus, former Article 37.071, V.A.C.C.P., was the controlling punishment provision. Had appellant been tried after August 30, 1993, however, Article 37.0711, V.A.C.C.P., would apply. Under either provision, the trial court was not authorized to sentence appellant to death sans an affirmative finding of "deliberateness."

MALONEY, Judge, concurring.

I join the opinion of the Court with the following note.

The law at the time of the offense required that before a court could assess the death penalty a jury and only a jury must have submitted to it for its answer an issue requiring them to find that the conduct was "deliberate." This is statutorily required. Tex.Code Crim.Proc.Ann. art. 37.071(b)(1).

The law prohibits a defendant from waiving trial by jury in a capital case where the State is seeking the death penalty. This too is statutory. Tex.Code Crim.Proc.Ann. art. 1.14(a). For us to hold otherwise would require us to act as legislators rather than judges.

APPENDIX B - ORDER DENYING REHEARING

OFFICIAL NOTICE
Court of Criminal Appeals
February 15, 1995
167th District Court - 91-1524
Re: Case No. 71,399
Style: Powell, David Lee
On this day the State's Motoin for Hearing was denied.
JUDGE MANSFIELD WOULD GRANT ON NO. 1

Supreme Court, U.S.
FILED
JUL 22 1995
CLERK

(2)

No. 94-1859

IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1994

DAVID LEE POWELL,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari
To the Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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36 pp

QUESTION PRESENTED

Whether a petitioner is constitutionally entitled to a new trial on guilt-innocence on the basis of alleged errors occurring solely during the punishment phase of his bifurcated capital murder trial.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINION BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED.	2
STATEMENT OF THE CASE	2
A. Course of Proceedings and Disposition Below	2
B. Statement of Facts	3
1. Guilt-Innocence Phase ...	3
2. Punishment Phase	6
REASONS FOR DENYING THE WRIT	15
I. THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.	15
II. POWELL'S ARGUMENT SUPPORTING HIS CLAIM THAT HE IS CONSTITUTIONALLY ENTITLED TO A NEW TRIAL WAS NOT PRESENTED TO THE COURT BELOW AND IS NOT A PROPER SUBJECT OF CERTIORARI REVIEW.	15

TABLE OF CONTENTS, continued

Page

III. POWELL HAS NOT ASSERTED ANY CONSTITUTIONAL BASIS FOR WHICH HE IS ENTITLED TO A NEW TRIAL. 17

A. The State did not repeat the constitutional violation condemned in Powell's first capital murder trial. 19

1. No Sixth Amendment Violation Occurred. 19

2. No Fifth Amendment Violation Occurred. 22

B. The presence of a large number of uniformed officers in the courtroom during the final arguments at the punishment phase of Powell's trial does not entitle him to a new trial. ... 27

CONCLUSION 29

TABLE OF AUTHORITIES

Cases	Page
Battie v. Estelle, 655 F.2d 692 (5th Cir. 1981)	25
Beck v. Washington, 369 U.S. 541 (1962)	16
Bd. of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537 (1987)	17
Buchanan v. Kentucky, 483 U.S. 402 (1987)	21,24
Cabana v. Bullock, 474 U.S. 376 (1986)	18
Cardinale v. Louisiana, 394 U.S. 437 (1969)	16
Estelle v. Smith, 451 U.S. 454 (1981)	20,23,25
Exxon Corp. v. Eagerton, 462 U.S. 176 (1987)	17
Fuller v. Oregon, 417 U.S. 40 (1974)	17
Gardner v. Florida, 430 U.S. 349 (1977)	18
Godchaux Co., Inc. v. Estopinal, 251 U.S. 179 (1919)	17
Heath v. Alabama, 474 U.S. 82 (1985)	16
Hill v. California, 401 U.S. 797 (1971)	16
Illinois v. Gates, 462 U.S. 213 (1983)	16
Irvin v. Dowd, 366 U.S. 717 (1961)	28
McKoy v. North Carolina, 494 U.S. 433 (1990) ...	18
Miranda v. Arizona, 384 U.S. 436 (1966)	12,22
Moore v. Dempsey, 261 U.S. 86 (1923)	28
Satterwhite v. Texas, 486 U.S. 249 (1988)	20

TABLE OF AUTHORITIES, continued

Cases	Page
Sheppard v. Maxwell, 384 U.S. 333 (1966)	28
Skipper v. South Carolina, 476 U.S. 1 (1986)	18
Street v. New York, 394 U.S. 576 (1969)	17
Tacon v. Arizona, 410 U.S. 351 (1973)	16
Tague v. Louisiana, 444 U.S. 469 (1980)	22,23
Turner v. Louisiana, 379 U.S. 466 (1965)	28
Constitutions and Statutes	
U. S. Const., amend. V	*passim*
U. S. Const., amend. VI	*passim*
U. S. Const., amend. XIV	2
28 U.S.C. § 1257(a)	2
TEX. CODE CRIM. PROC. ANN. art. 44.29(c) (Vernon Supp. 1995)	17,18
RULE 10.1, RULES OF THE SUPREME COURT	15

No. 94-1859

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1994

DAVID LEE POWELL,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari
To the Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent[1] herein, by and through the Attorney General of Texas, and files this Brief in Opposition.

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[1] For clarity, Respondent will be referred to as "the state" and Petitioner David Lee Powell as "Powell."

OPINION BELOW

The Court of Criminal Appeals affirmed Powell's conviction but vacated and remanded his death sentence for further proceedings consistent with that court's opinion. *Powell v. State*, 897 S.W.2d 307 (Tex. Crim. App. 1994).

JURISDICTION

Powell seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Powell bases his claims upon the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

By a reindictment[2] on April 4, 1991, in the 167th District Court of Travis County, Powell was charged with the capital murder of Ralph Ablanedo, a police officer acting in the lawful discharge of an official duty. Powell was tried by a jury, which on November 6, 1991, found him guilty as charged in the indictment. On November 15, 1991, following a separate

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[2] Powell was tried and convicted for the same offense and sentenced to death in 1978. The Court of Criminal Appeals affirmed the conviction. *Powell v. State*, 742 S.W.2d 353 (Tex. Crim. App. 1987). On petition for writ of certiorari, this Court vacated and remanded for further consideration. *Powell v. Texas*, 487 U.S. 1230 (1988). On remand the Court of Criminal Appeals again affirmed, *Powell v. Texas*, 767 S.W. 2d 759 (Tex. Crim. App. 1989), and this Court again granted Powell's petition for writ of certiorari. In *Powell v. Texas*, 492 U.S. 680 (1989), this Court reversed the judgment of the Court of Criminal Appeals. Subsequently, Powell was retried; that retrial is the subject of the instant petition for writ of certiorari.

punishment hearing, the jury answered affirmatively two special sentencing issues,[3] and the trial court imposed the death sentence.

Powell's conviction and death sentence were automatically appealed to the Texas Court of Criminal Appeals, which on December 7, 1994, affirmed the conviction but vacated the death sentence and remanded for a new sentencing hearing. *Powell v. State*, 897 S.W.2d 307 (Tex. Crim. App. 1994). The state filed a motion for rehearing, which was denied on February 15, 1995. These proceedings followed.

B. Statement of Facts

1. Guilt-Innocence Phase

In the early morning hours of May 18, 1978, Sheila Meinert, a friend of Powell's, was driving Powell to south Austin in Powell's red Ford Mustang at his request. 24 SR 116-18.[4] Powell was very upset. 24 SR 117. Powell had a machine gun in the back seat of the car, as well as a live hand grenade, some other guns, ammunition, handcuffs, books about weapons, radical political literature, a knapsack containing approximately $6,000 of distributable methamphetamine, a flyer consisting of a price sheet for selling methamphetamine, and other written notes or "tally sheets" containing names of buyers

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[3] Instead of submitting to the jury the special issues in effect at the time of Powell's offense, the trial court replaced the "deliberateness" special issue with an "anti-parties" special issue which was the product of then recent amendments to article 37.071 of the Texas Code of Criminal Procedure. On appeal, the Court of Criminal Appeals concluded that the trial court's actions were contrary to legislative mandate because the amended portions of the code dealing with the special issues applied only to offenses committed on or after September 1, 1991. It is on this basis that the court remanded Powell's case for a new sentencing hearing. *Powell v. State*, 897 S.W. 2d at 317.

[4] "SR" refers to the statement of facts from Powell's trial, preceded by volume number and followed by page number. "Tr." refers to the transcript of Powell's trial.

and calculations of profits. 24 SR 130; 25 SR 228-262; 26 SR 610-13; 28 SR 864-69.

Ralph Ablanedo, a police officer in a marked patrol car, stopped Meinert and Powell on Live Oak Street in Austin. 24 SR 119. Meinert got out of the car and approached Officer Ablanedo, who asked to see her driver's license. 24 SR 119. Meinert responded that she had lost her license at which time the officer asked to see Powell's driver's license. 24 SR 120-21. Officer Ablanedo attempted to run a computer check on Powell's license but the dispatcher informed him that the computers were down. 26 SR 524-25. Officer Ablanedo issued Meinert a citation and allowed her and Powell to proceed. 24 SR 124.

Immediately after Meinert and Powell drove off, the dispatcher notified Officer Ablanedo that there was a possible misdemeanor theft warrant on Powell. 26 SR 527. Officer Ablanedo again stopped Meinert and Powell, and Meinert again got out of the Mustang to approach the officer. 24 SR 124-25. Suddenly Meinert heard a "deafening noise," which she later learned were gunshots. 24 SR 125, 128. Meinert ran back to the Mustang and "started driving hysterically." 24 SR 128. At trial, Meinert testified that she was surprised that Powell would do something like shoot a police officer. 24 SR 158-59. However, she testified that Powell used drugs and that his behavior had become progressively more "extreme." 24 SR 159.

Bobby Bullard was driving by at the time of the murder and testified that he saw a police car and a Mustang stopped on the side of the road. 25 SR 359. The policeman got out of his car and was walking between the two cars when Bullard heard two to four shots and saw the policeman go down. 25 SR 359-61. The officer attempted to stand up but was immediately shot again by an automatic weapon. 25 SR 361. Bullard saw a man between the two front seats of the Mustang shooting through the side and back of the car with a rifle. 25 SR 363. Bullard identified Powell as the man he saw in the Mustang. 25 SR 367. Bullard also thought he saw a portion of someone else's head under the steering wheel of the Mustang. 35 SR 393. Bullard

went to help Officer Ablanedo and heard him say, "The damn girl." 25 SR 380.

Immediately after this shooting, Meinert drove to a nearby parking lot, stopped the car, and Powell exchanged gunfire with more police officers at this location. 24 SR 132-33. Powell gave Meinert the hand grenade and told her to unwrap the tape around it. 24 SR 133-34. She gave the grenade back to Powell but did not recall what he did with it. 24 SR 134. Officer Joe Villegas was the first police officer on the scene of the second shooting and testified that he immediately came under heavy fire after pulling into the parking lot. 27 SR 731. A white female then exited the Mustang screaming with her hands up. 27 SR 733. Officer Villegas yelled at her to lay down in the middle of the asphalt. 27 SR 733.[5] Officer Villegas saw a white male running towards Oltorf Street. 27 SR 733. He shot at the man but missed, and then lost track of him. 27 SR 733-34. Officer Villegas found a hand grenade lying about ten to fifteen feet from his squad car. 27 SR 735. Powell was later found hiding under some bushes at the nearby Travis High School. 25 SR 313. When Officer Villegas saw Powell at the police station, he knew Powell and recognized him as the person who had shot at him. 27 SR 736.

Officer Bruce Mills testified that he arrived at the first scene after Officer Ablanedo had been shot and that Officer Ablanedo told him "that a girl and a guy were in the car, and that they were armed with a shotgun or a machine gun is what he said, and then he said, 'He got me with the shotgun.'" 29 SR 1082. Officer Ablanedo died as a result of multiple gunshot injuries. 26 SR 640.

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[5] Meinert was arrested and taken to jail. 27 SR 733. She was later convicted of the attempted capital murder of Officer Villegas. 24 SR 135-36.

2. Punishment Phase

State's Evidence

Fred Ligarde, an FBI agent at the time of the murder, testified that on May 19, 1978, Powell and his attorney gave consent to search Powell's residence. 31 SR 4-5. Inside the house were a black cylinder containing a hand grenade, some small vials of methamphetamine, some .45 caliber ammunition and 7.62 Russian ammunition, reloading dice, various chemicals and lab equipment for manufacturing methamphetamine, and military manuals on military tactics and the operation of machine guns and other weapons which are issued by the United States government. 31 SR 16, 22, 26.

James Walsh, a police officer, knew Powell prior to the murder and stated he had a bad reputation in the community for being a peaceable and law-abiding citizen. 31 SR 41-2.

Dr. Clay Griffith, a psychiatrist who did not examine Powell, testified on the basis of a hypothetical that Powell posed a continuing threat to society. 31 SR 82. Dr. Griffith further testified that, although the use of methamphetamines may affect a person's personality, it does not cause a person to kill. 31 SR 83-4. On cross-examination, Dr. Griffith testified that a person can develop a psychosis from abusing methamphetamines. 31 SR 103. However, on redirect, Dr. Griffith testified that even assuming such a psychosis, it did not change his opinion that Powell was a future danger. 31 SR 106.

Defense Evidence

Bill Powell, Powell's father, testified that his son did very well in school, had a lot of friends and was an "exceptionally good child" who never had any behavioral problems growing up. 32 SR 122-28. Powell was valedictorian of his high school class and was accepted into the honors program at the University of Texas. 32 SR 129-32. However, after going to college, Powell's political views began to cause problems with his parents and they eventually lost all contact with him for a few

years. 32 SR 132-33. In 1977, Bill Powell saw his son in Dallas and he appeared thin, haggard and disheveled. Bill Powell testified that Powell would not be a future threat to society. 32 SR 141. He stated on cross-examination that Powell had never admitted to him that he committed the murder. 32 SR 142.

Frida Malone, Powell's aunt, testified that Powell always had a very nice personality and was interested in many different things as a child. 32 SR 154-55. However, the last time she saw him before the murder in 1977, he looked "extremely abnormal". 32 SR 158. Malone suggested to Powell's mother that Powell see a psychiatrist but that same night Powell disappeared from his parents' house in the middle of the night. 32 SR 159-60. Malone testified that Powell could do a lot of good for the world because of his intelligence and that she loved Powell very much. 32 SR 179-80.

Dr. Lester Grinspoon, a psychiatrist, testified that amphetamine use can lead to psychosis, meaning that the person "loses touch with reality," and some of the manifestations may be "bizarre behavior, poor judgment, hacullinations [sic], allusions, that sort of thing." 32 SR 197-99. He further testified that anyone who uses tremendous amounts of methamphetamine, regardless of his personality, will become aggressive and dangerous and that taking enough of the drug will cause a paranoid psychosis. 32 SR 209. Finally, he testified that a psychiatrist cannot predict future dangerousness. 32 SR 210-11.

Dr. John Luker testified that Powell sought help from him in 1977 for his methamphetamine dependency and that he treated Powell by prescribing cyclert, a central nervous system stimulant, as a substitute drug. 32 SR 241-43. He stopped seeing Powell in December of 1977, and that was also the last time he prescribed cyclert for Powell. 32 SR 246. Powell had not stopped using drugs at that time. 32 SR 246. Dr. Luker testified he was a recovering addict himself. 32 SR 248.

George Wheat, a clinical psychologist with the Texas Department of Corrections ("TDC") testified that Powell was selected for the work capable program in TDC which selects only those inmates considered not to be dangerous. 32 SR 252-

57. Wheat testified that Powell was helpful to other inmates, teaching them to read and write. 32 SR 262. On cross-examination, Wheat testified Powell had had some minor disciplinary infractions in prison for refusing to obey certain rules and orders. 32 SR 265-68.

Helen Wallace, a licensed vocational nurse at TDC, testified as to Powell's good character and stated she did not feel he would pose a future threat to society. 32 SR 272-92. Ron Hampton, a police officer from Washington, D.C., who is involved in numerous community help programs, testified that Powell had arranged some speaking engagements for him in Austin and that it would be a waste to execute Powell because he had a lot to offer society. 32 SR 317-20. Donnette Moss, an advisor within the Plan II Honors Program at the University of Texas, testified that when Powell entered college he was a sweet-natured person and was concerned about the well-being of others. 32 SR 337. Powell scored an almost perfect score on the SAT college entrance exams. 32 SR 338. Moss testified that Powell should not be executed and was of use to society. 32 SR 343. David Van Os, an attorney who met Powell in the Honors II program at UT, testified that when he first met Powell, Powell was a kind person whom anybody would be glad to have for a friend. 33 SR 353-54. He stated that Powell has a lot to offer society. 33 SR 360.[6]

Dr. Richard Psikoff, a psychiatrist who had examined Powell, testified about Powell's past and his family history of mental illness and depression. 33 SR 394-400. He testified that after Powell went to college he became depressed and turned to drugs. 33 SR 401-05, 412, 437. Dr. Psikoff testified that in July of 1977 Powell went to Dr. Luker for help with his drug problem. 33 SR 425-26. He stated that Dr. Luker's incompetent use of cyclert to treat Powell only exasperated the problem because Powell was using the cyclert in conjunction

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[6] Other witnesses that testified in favor of Powell's good character were Sissy Farenthold, 33 SR 539; Clarence Brandeley, 33 SR 547; John Wheat, 33 SR 565.

with the methamphetamines instead of as a substitute for them. 33 SR 426-32, 36. He testified that

> Between July and December, David starts to believe we're into World War III. We have an invasion coming. Remember, we said you can go crazy on this stuff. David buys machine guns. He buys hand grenades. . . . He gets so paranoid he can't even go out of the house. He's shooting speed. He's taking cylert [sic]. . . . Four months later, he kills a policeman.

33 SR 431. On cross-examination, Dr. Psikoff testified that he thinks Powell "was quite crazy in 1978" and that at the time he killed Officer Ablanedo "he was insane on the drugs that he had taken." 33 SR 458-59. At this time, the state asked Dr. Psikoff whether he had read Dr. Richard Coon's testimony from the prior trial and his report made after examining Powell, to which Dr. Psikoff responded he had. 33 SR 460. Dr. Psikoff disagreed with Dr. Coon's conclusion that Powell was legally sane at the time of the murder. 33 SR 461. When asked if Powell was insane and unable to conform his conduct to the requirements of the law on May 18, 1978, Dr. Psikoff testified as follows:

> You have to be very careful when you say that because I know that, as a consequence of Dr. Luker's treatment and David's administration, that he was insane. But I'm not telling you that David wasn't a party to the administration of those drugs. I'm not telling you that he was insane simply because somebody else came along.
>
> I'm telling you that David was already a drug user when he went to Dr. Luker, and that when he was finished with that treatment, he was truly insane. When he killed policeman [sic], yes, he was insane. He was insane as a result of the drugs he was on. That is correct.

33 SR 495. Dr. Psikoff stated that he knew the difference between the defense of insanity at the guilt-innocence phase and the use of voluntary intoxication as a mitigating circumstance at

punishment, and testified that he felt Powell's evidence of insanity fell into the latter category. 33 SR 496. However, he maintained that Powell's voluntary intoxication had rendered him insane at the time of the murder. 33 SR 496. Dr. Psikoff testified that he did not think the reason Powell so heavily armed himself had anything to do with his desire to protect his drug business. 33 SR 514. He stated that he thought "David was quite psychotic when he killed a policeman[,]" that Powell thought World War III was approaching and that there would be a fascist invasion for which he had to prepare. 33 SR 514-15, 519, 523. Finally, Dr. Psikoff testified that *Powell had admitted to him that he killed Officer Ablanedo.*

Dr. James Marquartz testified that it is impossible for psychiatrists to make any sort of accurate long-term prediction regarding a person's future dangerousness. 34 SR 595.

Finally, Powell's mother testified that Powell was a very good student and was "a delight" as a child. 34 SR 630. However, Powell changed once he went off to college and "took on a lot of radical thinking." 34 SR 633. Nevertheless, Powell's mother was shocked to find out Powell had shot a police officer and thought the police must have the wrong person. 34 SR 641. She testified that Powell is a very caring and sweet person and would not commit future acts of violence. 34 SR 652.

State's Rebuttal

Bruce Hobbs, the owner of an auto parts store and service center that had done some work on Powell's car, testified that Powell's check to him bounced. 34 SR 672. Hobbs eventually found out where Powell lived and attempted to retrieve the car. When Powell came to the front door he was holding by a collar a "pretty mean-looking dog" that was trying to lunge at Hobbs. 34 SR 675. When Hobbs said he intended to take the car, Powell said, "Well, I wouldn't do that if I were you." 34 SR 675. Hobbs pulled a gun and held it on Powell and the dog until a friend of his arrived and took the car. 34 SR 675-77. As Hobbs walked toward his own truck, "the door opened and here came the dog." 34 SR 677. Hobbs made it

safely into the truck and threatened Powell he had better get the dog away from the truck, which Powell did. 34 SR 677. Hobbs did not know if Powell deliberately released the dog or whether it was an accident. 34 SR 677.

Steve Edwards, a former assistant district attorney for Travis County, testified that at a prior hearing regarding Powell, Powell kicked a security guard when the guard pulled him away from the railing where Powell was attempting to lean over and speak with or kiss a family member. 34 SR 688.

George Haywood, a transportation officer with the Travis County Sheriff's Office, testified about an incident where Powell was angry that he was not given some requested eyedrops and cursed at Haywood. 34 SR 699-701.

Lee Ramos, the maintenance man who worked for one of Powell's former landlords, testified that he found Powell attempting to break into a storage room to retrieve his property that had been stored there after his eviction. 34 SR 717-19. Ramos left to call the police, and Powell started following him with a knife. 34 SR 720. When Ramos stopped at a red light, Powell got out of the car he was in and attempted to approach Ramos, but Ramos jumped the curb and ran all the red lights until he got home. 34 SR 721-24. Powell went to Ramos' house, but Ramos' wife would not let Powell in the house. 34 SR 724. Powell told Ramos' wife that he did not mean to scare Ramos. 34 SR 736.

Wesley Wallace, the medical doctor working in the emergency room on May 18, 1978, testified that he found Powell to be of normal mental status with no abnormality. 34 SR 752.

Dr. James Grigson, a psychiatrist, testified on the basis of a hypothetical that Powell is a continuing threat to society and a very dangerous person. 34 SR 795. He also testified that drugs do not cause people to be involved in goal-directed, criminal-type activities. 34 SR 795. Dr. Grigson testified that Powell's medical records show he was diagnosed as recently as 1988 and 1989 as a sociopath.

Dr. Kenneth Timken, a psychiatrist who examined Powell several years before the murder, testified about the

results of his examinations. 34 SR 837-42. Dr. Timken testified that Powell did not reflect any guilt about a car theft charge and that he felt Powell represented a severe character neurosis. 34 SR 838-39. At that time, he felt Powell exhibited an evolving sociopathic personality. 34 SR 840, 842. Powell told the doctor he never felt guilt. 34 SR 840. On a following session, Dr. Timken noted a "highly narcissistic character disorder," meaning a person "who has little capacity for empathy with other people and who is centered in their own wishes and impulses without regard for other human beings". 34 SR 841. Dr. Timken testified he was not surprised to learn that Powell later murdered a police officer. 34 SR 842. Finally, Dr. Timken testified that drug use can accentuate certain kinds of behavior, but does not change the basic characterological makeup of the person. 34 SR 843.

Finally, the state called Dr. Richard Coons to the stand. 34 SR 850. On voir dire examination outside the presence of the jury, Dr. Coons testified that before he examined Powell, he gave Powell his *Miranda*[7] warnings and received clearance from Powell's attorney. 34 SR 850-51.[8] Dr. Coons further stated that he was not even going to broach the subject of Powell's future dangerousness and intended only to testify regarding Powell's sanity at the time of the murder. 34 SR 852. Back in the presence of the jury, Dr. Coons testified that Powell "did not have substances in his body at [the time of the murder] which rendered him unable the [sic] know that his conduct was wrong or unable to conform his conduct." 34 SR 862. Dr. Coons disagreed with Dr. Psikoff's conclusions that Powell thought World War III was coming and was under a drug psychosis. 34 SR 863. Dr. Coons then explained how Powell had related the events leading up to the murder:

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[7] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[8] Later, Dr. Coons again testified that Powell told him he did not want to discuss the offense until he cleared it with his lawyer, and that subsequently Powell did clear it with his lawyer and then spoke to the doctor about the offense. 34 SR 877.

He indicated to me that he was a speed dealer and that he had armament to protect himself from people taking money or drugs from him; that--he said that the gun that--the automatic weapon, he had it for months to a year; he had gotten it because he carried a lot of money. . . .

'It's a symbol of authority, and to keep rustlers and varmints off my tail.' He said, 'People would think you were crazy if you showed up and didn't have that kind of hardware.' And he indicated that his business consisted of--he had taught someone how to make methamphetamine. He was getting half a pound to a pound a week, and was selling it throughout Texas, and his income was in the seven, eight, ten thousand dollar a week range from the sale of methamphetamine.

. . . I asked him why he had the machine gun. He said that, 'It wasn't to be used for killing some young punk like that. It was for a declaration of the seriousness of intent,' and that, with regard to the offense, he indicated that he and Sheila Meinert were stopped, the officer then checked their identification, wrote her a ticket, let her go, and that--stopped them again. . . . Sheila jumped out of the car. He, as he had fantasized in the past--I asked him if he had ever thought that he might kill an officer at any time, and he indicated that his idea was that it might occur out on a country road.

He said, 'I always envisioned it happening on a country road, and I had just gotten lost after shooting an officer.'

He indicated that when the officer was coming up to the car to address him, he said, 'I waited until the nth minute before I shot. I didn't want to shoot some jerk that was coming up to say happy motoring.'

> He indicated that the whole thing was to avoid being caught--that is, as to killing the officer--was to avoid being caught. It's senseless otherwise.
>
> ****
>
> He indicated that--he said, 'As the officer stopped us, it was a routine check. At the time I had about $10,000 worth of checks out.' And then, 'He gave my license back, and then he pulled us over again. I felt like everything I had been working for was going down the drain.'
>
> He said, 'There was dope in the trunk and a package with a pistol. . . .'
>
> . . . . [H]e indicated that the specific reason that he shot the officer was to avoid being arrested, that -- he said, 'I would have been in almost as much trouble if I had been arrested.'

34 SR 863-66. Dr. Coons testified that Powell did not act remorseful at all.[9] Powell talked about how "I killed a cop and I'm sort of a folk hero[.]" 34 SR 866.

Defense Rebuttal

Dr. Marquartz testified that he had done a study on people that Dr. Grigson had testified against in capital murder cases and that his predictions were inaccurate. 34 SR 885-86.

Dr. Richard Wall testified similarly regarding Dr. Grigson's predictions. 34 SR 888-91.

Dr. Psikoff testified that as of 1990 or 1991, Powell has no antisocial personality problems. 34 SR 895. He further testified that in his earlier testimony he did not intend to imply that he thought the defense of legal insanity had been raised in the case, and that "I am not saying that he was insane[.]" 34 SR 896-97. Psikoff admitted that Powell had told him he shot the

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[9] On cross-examination Dr. Coons acknowledged that he had previously testified that Powell did show some remorse, but stated he was having trouble remembering and was a little surprised he had testified that way. 34 SR 87.

officer and had drugs in the car and did not want to be arrested. 34 SR 897. He stated that Powell certainly knew the man was a police officer. 34 SR 898. On cross-examination, Psikoff stated that he had never said Powell was insane at the time of the offense and that if he had stated Powell did not know his conduct was wrong when he shot Officer Ablanedo he had misspoken because "he was certainly sane at the time." 34 SR 914-15. He further stated that Powell killed the policeman because he did not want to go to jail. 34 SR 915.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 10.1 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Powell advances no special or important reason in this case, and none exists. Further, the issues in this case involve only the application of established constitutional principles to the facts. Thus, the petition presents no important question of law to justify this Court's exercise of its certiorari jurisdiction.

II.

POWELL'S ARGUMENT SUPPORTING HIS CLAIM THAT HE IS CONSTITUTIONALLY ENTITLED TO A NEW TRIAL WAS NOT PRESENTED TO THE COURT BELOW AND IS NOT A PROPER SUBJECT OF CERTIORARI REVIEW.

In the court below, Powell requested that his entire conviction be reversed, but he never asserted the alleged constitutional basis that he now asserts entitles him to a new trial

on guilt-innocence. In the instant petition, Powell asserts he is constitutionally entitled to a reversal of his conviction as opposed to merely a reversal of his death sentence. While apparently conceding that the complained-of errors occurred solely during the punishment phase of his bifurcated trial and, therefore, after the jury's verdict of guilt, Powell now asserts that the trial court still had the power at the conclusion of the punishment proceedings to override the jury's guilty verdict, or at least to grant a new trial. *See* Petition at 8-9. He therefore contends that errors during the punishment phase of his trial could have led to his conviction because the trial judge *could* have been affected by the alleged errors and perhaps would have decided to override the jury's verdict of guilt *except* for the alleged errors. *Id.* Not only is this contention completely without merit, it was never presented to the Texas state courts and cannot be asserted for the first time in this Court as a basis for a reversal of Powell's conviction.

The cases are legion that this Court will not decide issues raised for the first time on petition for certiorari, and that the Court will not decide federal questions not raised and decided in the court below. *E.g., Heath v. Alabama*, 474 U.S. 82, 87 (1985); *Illinois v. Gates*, 462 U.S. 213, 218-22 (1983); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973); *Hill v. California*, 401 U.S. 797, 805-06 (1971); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). In articulating this requirement, the Court has stressed the long-standing nature of the rule: "[I]n *Crowell v. Randall*, 10 Pet. 368 (1836), Justice Story reviewed the earlier cases commencing with *Owings v. Norwood's Lessee*, 5 Cranch 344 (1809), and came to the conclusion that the Judiciary Act of 1789, 20 § 25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' 10 Pet. 368, 391." *Cardinale*, 394 U.S. at 439. To properly invoke the jurisdiction of the Court, it is crucial that the federal question not only be raised in the prior proceedings, but that it be raised at the proper point. *Beck v. Washington*, 369 U.S. 541, 550 (1962); *Godchaux Co., Inc. v.*

Estopinal, 251 U.S. 179, 181 (1919). Moreover, on direct review,

> [w]hen 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.'

Bd. of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537, 550 (1987), quoting *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983), quoting *Fuller v. Oregon*, 417 U.S. 40, 50 n.11 (1974), quoting *Street v. New York*, 394 U.S. 576, 582 (1969). Consequently, because the federal question raised in the instant petition for certiorari review was neither raised nor decided by the Court of Criminal Appeals, this Court cannot decide the issue.

III.

POWELL HAS NOT ASSERTED ANY CONSTITUTIONAL BASIS FOR WHICH HE IS ENTITLED TO A NEW TRIAL.

Powell asserts he is entitled to an entire new trial, as opposed to merely the resentencing the Court of Criminal Appeals ordered, because of certain alleged constitutional violations occurring during the punishment phase of trial. This claim is wholly without merit.

Initially, Powell incorrectly asserts that the Court of Criminal Appeals left "open" the question of whether Powell was to receive a new trial or merely a new punishment proceeding. This is incorrect. The court in its opinion clearly stated "We affirm appellant's conviction, but vacate and remand his sentence for further proceeding in accordance with Article 44.29(c)." *Powell*, 897 S.W.2d at 309. Article 44.29(c) requires that when error in a capital murder trial affects the punishment phase only, the court "shall not set aside the conviction but rather shall commence a new punishment hearing

as if a finding of guilt had been returned." Tex. Code Crim. Pro. Ann. art. 44.29(c) (Vernon Supp. 1995).[10] Accordingly, from the court's language, it is entirely clear that the court never intended to grant a new trial to Powell on the basis of the errors found.

Second, as shown above, Powell asserts no basis for an entitlement to a new trial on guilt-innocence because the errors of which he complains occurred during the punishment phase proceedings, not during the guilt-innocence phase proceedings. The jury had already found Powell guilty of capital murder and handed down its verdict before it considered any punishment phase evidence. As stated, in order to sidestep this obvious hurdle to his request for a new trial, Powell asserts that the trial judge "retained the power to make rulings affecting guilt as well as punishment" until after the punishment phase of trial and that, therefore, the alleged problems arising in punishment could have affected the court's judgment on the verdict of guilt against Powell. Of course, Powell asserts absolutely no basis in Texas law by which a trial court could accept the jury's verdict of guilt, proceed to the punishment phase of trial, and then override the jury's verdict of guilt and order an acquittal at the conclusion of the punishment phase proceedings. Moreover, even assuming

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[10] Conceding that this is an inappropriate time, procedurally, to lodge such a complaint, Powell nevertheless suggests that there may be some constitutional infirmity with article 44.29(c) because it allows for resentencing as opposed to a new trial on guilt-innocence when error occurs only in the punishment phase of trial. He asserts that the jury's initial finding of guilt does not result in a judgment being entered, and that a final judgment is not rendered until after the punishment phase proceedings, apparently implying that the trial court renders only one final judgment that applies to both of the jury's findings and that this judgment cannot be reversed only in part as to sentencing. Of course, this Court has repeatedly vacated a petitioner's death sentence and remanded for resentencing when the complained-of error affected only the punishment decision. *See, e.g., McKoy v. North Carolina*, 494 U.S. 433, 435 (1990); *Skipper v. South Carolina*, 476 U.S. 1, 8-9 (1986); *Cabana v. Bullock*, 474 U.S. 376, 392 (1986); *Gardner v. Florida*, 430 U.S. 349, 362 (1977). Powell demonstrates no basis upon which to conclude that these decisions were unconstitutional or that the Court's decision in such cases is flawed.

such a procedure was possible, the court clearly indicated it would not be willing to do so in the instant case by refusing to grant Powell's motion for instructed verdict made *after* the guilt-innocence phase evidence had been submitted and *before the punishment phase proceedings began*. 30 SR 1096. The court clearly did not believe the evidence insufficient to convict Powell even before the punishment phase. Thus, Powell's suggestion that the court may have been inclined to order an acquittal except for alleged errors occurring during punishment is belied by the court's denial of Powell's motion for instructed verdict even before the punishment phase began.

Finally, even if Powell could conceivably demonstrate that the trial court was capable of overriding the jury's guilty verdict *after* the punishment phase proceedings, and that the court was inclined to do so *except* for the alleged errors occurring at punishment, he has failed to demonstrate any constitutional error at punishment.

A. The State did not repeat the constitutional violation condemned in Powell's first capital murder trial.

Powell first complains that the state violated his Fifth and Sixth Amendment rights by introducing Dr. Coon's testimony at the punishment phase of trial. He bases his argument primarily on this Court's holding in *Powell v. Texas*, 492 U.S. 680 (1989), in which the Court concluded that Fifth and Sixth Amendment violations occurred during the punishment phase of Powell's first trial. The problem with Powell's analysis, of course, is that simply because the same doctor testified at the punishment phase of both trials, and his testimony was found unconstitutional in the first case, does not make his substantially different testimony at the second trial unconstitutional.

1. No Sixth Amendment Violation Occurred.

It is clear that a capital defendant is entitled to "the assistance of his attorney[] in making the significant decision of

whether to submit to [a psychiatric] examination and to what end the psychiatrist's findings [can] be employed." *Estelle v. Smith*, 451 U.S. 454, 471 (1981); *see Satterwhite v. Texas*, 486 U.S. 249, 254 (1988).

Here, as demonstrated in the statement of facts, *supra*, Dr. Coons testified that he received clearance from Powell's attorneys to examine Powell. 34 SR 851. He stated that at the previous trial Powell's attorneys asserted they were not aware that his examination would encompass future dangerousness and that he nevertheless testified to Powell's future dangerousness at that trial. 34 SR 851. Dr. Coons stated that he would not broach the subject of Powell's future dangerousness in this trial and intended to testify only as to his sanity at the time of the murder. 34 SR 852. Powell's attorney then objected on the basis, among other things, that Dr. Coons was not allowed to testify at all at the punishment phase of trial under this Court's opinion in *Powell v. Texas*, 492 U.S. 680 (1989). However, counsel neither asserted nor objected that Powell's original attorneys were unaware that the examination would encompass the issue of Powell's sanity at the time of the offense.[11] 34 SR 855-58. Later, Dr. Coons again testified that the first time he examined Powell it was only for approximately fifteen or twenty minutes and that Powell told him he did not want "to discuss the offense until he cleared it with his lawyer, . . . He had talked with a lawyer already, but that he--he indicated that he was willing to talk with me, but wanted to be sure he cleared it with his attorney before he talked about the offense." 34 SR 876-77. After Powell cleared it with his lawyer, Dr. Coons examined him subsequently at which time Powell discussed "his thinking and his behavior as regards the offense." 34 SR 877.

Thereafter, as he stated he would, Dr. Coons did not testify as to Powell's future dangerousness but rather merely rebutted the testimony of Powell's expert that Powell was insane when he committed the murder and thought World War III was

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[11] Indeed, as this Court noted in *Powell v. Texas*, 492 U.S. at 681, the court order at issue specifically ordered Dr. Coons to examine Powell as to his competency to stand trial and sanity at the time of the offense.

coming. 33 SR 431, 458-59, 495-96, 514-15, 519, 523; 34 SR 862-66.

On the basis of these facts, it is clear that no Sixth Amendment violation occurred in Powell's retrial. As this Court noted in *Buchanan v. Kentucky*, 483 U.S. 402, 424 (1987), the proper focus for purposes of the Sixth Amendment is not on how the psychological evidence is used but, rather, whether the defendant was able to consult with counsel regarding the scope and nature of the examination. *Id.* There is no dispute here that Powell had such a consultation and then agreed to Dr. Coon's examination.[12] Thus, the protections at which the Sixth Amendment are aimed, that is, preventing a defendant from making significant decisions that could deny him a fair trial by assuring the assistance of counsel at critical stages in the proceedings, were not abridged in the instant case. Here, Powell clearly had "the guiding hand of counsel" in making the important decision of whether to submit to Dr. Coon's

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[12] Powell's reliance on this Court's decision in the direct appeal of his first trial is unconvincing. As demonstrated above, the facts surrounding the use of Dr. Coon's testimony differs dramatically between the two trials. When Dr. Coons testified at Powell's first trial, he testified as to Powell's future dangerousness, an issue that Powell's attorneys asserted they were wholly unaware the examination would encompass. Here, Dr. Coons testified solely as to the issue of Powell's sanity at the time of the offense, one of the precise issues for which the examination was ordered. Powell has never complained, and does not complain here, that his attorneys were unaware that the examination would include the sanity issue. To the extent he attempts to assert that he was unaware the examination could be used for purposes of punishment, this argument is unavailing. A defendant's sanity at the time of a murder is highly relevant at both the guilt-innocence and punishment phases of his capital murder trial. At guilt-innocence, such evidence can be used as an affirmative defense by the defendant; at the punishment phase, such evidence can be used in mitigation of punishment. Thus, defense counsel's knowledge that the examination would include a sanity determination is the relevant inquiry; any competent defense counsel would know how such evidence could thereafter be used, and rebutted, at a capital murder trial. Accordingly, Powell's two trials are entirely different for purposes of Sixth Amendment analysis.

examination. *Powell*, 492 U.S. at 681. Accordingly, Powell's claim must fail.

2. No Fifth Amendment Violation Occurred.

Next, Powell relies on *Tague v. Louisiana*, 444 U.S. 469 (1980), and asserts that his Fifth Amendment rights were violated by Dr. Coon's testimony because there is insufficient evidence that the *Miranda* warnings given by Dr. Coons to Powell before his examination were sufficiently understood and/or waived by Powell.

Initially, it is clear from the record that Powell knowingly and intelligently waived his Fifth Amendment rights. It is true that statements by a defendant are inadmissible at trial when there is "no evidence at all" that the defendant knowingly and intelligently waived his rights before making the inculpatory statement. *Id.* at 471. However, a waiver of *Miranda* rights "need not be explicit but may be inferred from the actions and words of a person interrogated . . . ." *Id.*

In the instant case, the record reflects that Dr. Coons administered Powell his *Miranda* warnings and that Powell at first declined to answer any questions regarding the offense until he had cleared it with his lawyer. 34 SR 851, 876-77. Powell did indicate, however, that he knew his legal status, that he had been given his rights by the policeman and the Judge, and that he was charged with capital murder for killing a policeman. 34 SR 876. After consulting with his lawyer, Powell discussed the offense and his thinking and behavior at the time of the offense. 34 SR 877.[13] Here, Powell's actions in refusing to discuss the offense without clearance from his lawyer demonstrates that he fully understood Dr. Coon's *Miranda* warnings, initially invoked

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[13] Furthermore, it should be noted that Powell is extremely intelligent, scoring a near perfect score on the SAT college entrance exams, and cited as having an IQ of 145. 32 SR 338; State's Exhibit 384 at "Neuropsychiatric Evaluation" dated 2-21-88 and "Texas Department of Corrections Social History" dated 4-26-88; see also State's Exhibit 384 at Psychiatric Evaluation dated May 4, 1979. It is highly unrealistic to argue that he would not understand the import of the *Miranda* warnings.

them to some extent, and then voluntarily waived them. There is ample evidence in the instant case that Powell knowingly and intelligently waived his Fifth Amendment rights. Accordingly, this case is distinguishable from the facts in *Tague*.

Even assuming the record was insufficient to demonstrate Powell knowingly waived his Fifth Amendment rights, Powell *has* waived any right to complain of the alleged Fifth Amendment violation because he interjected the issue of temporary insanity into the trial during the punishment phase. In *Estelle v. Smith*, this Court held that Fifth Amendment concerns apply to the punishment phase of a capital murder trial to prohibit the state's affirmative use of unwarned statements by the defendant to a psychiatrist. 451 U.S. at 466. The Court concluded in that case that when the court-appointed psychiatrist testified for the prosecution at the penalty phase regarding the defendant's future dangerousness, his role changed "and became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting." *Id.* at 467. Accordingly, the defendant's statements "could be used as the State did at the penalty phase only if respondent had been apprised of his rights and had knowingly decided to waive them." *Id.* at 469.

However, the Court further noted that a defendant could waive his Fifth Amendment rights:

> When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case. Accordingly, several Courts of Appeals have held that, under such circumstances, a defendant can be required to submit to a sanity examination conducted by the prosecution's psychiatrist.

Id. at 465 (citations omitted). The Court then noted that, on the same theory, the Court of Appeals in that case had left open the possibility that a defendant who wishes to use psychiatric evidence in his own behalf on the issue of future dangerousness can be precluded from using it unless he is also willing to be

examined by a state psychiatrist. *Id.* at 466 n. 10. The Court later referred back to footnote ten by concluding:

> Our holding based on the Fifth and Sixth Amendments will not prevent the State in capital cases from proving the defendant's future dangerousness as required by statute. A defendant may request or consent to a psychiatric examination concerning future dangerousness in the hope of escaping the death penalty. In addition, a different situation arises where a defendant intends to introduce psychiatric evidence at the penalty phase. *See* n. 10, *supra*.

Id. at 472.

Later, in *Buchanan v. Kentucky*, the Court held that the state's use of a psychiatric report to rebut a petitioner's psychological evidence introduced at trial to establish the affirmative defense of "extreme emotional disturbance" did not violate his Fifth Amendment rights. 483 U.S. at 423. The Court noted that "with petitioner not taking the stand, the Commonwealth could not respond to this defense unless it presented other psychological evidence." *Id.* Finally, in *Powell*, 492 U.S. at 683-85, the Court noted that

> it may be unfair to the state to permit a defendant to use psychiatric testimony without allowing the state a means to rebut that testimony, . . . Thus, if a defendant were to surprise the prosecution on the eve of trial by raising an insanity defense to be supported by psychiatric testimony, the court might be justified in ordering a continuance and directing that the defendant submit to examination by a state-appointed psychiatrist.

None of these cases limit the state's right to rebut a defendant's psychological evidence to the guilt-innocence phase of trial. Indeed, the Court's statements in *Estelle* suggest just the opposite: that is, the state should be allowed to rebut a defendant's psychological evidence used at the punishment phase of trial with psychological evidence of its own just as it would be

entitled to do at the guilt-innocence phase of trial. *Estelle*, 451 U.S. at 472 & 466 n. 10. Moreover, the reasoning behind finding a waiver of the defendant's Fifth Amendment rights at the guilt-innocence phase of trial is the same at the punishment phase.

> 'Once a defendant decides to testify, (t)he interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination.'. . . By introducing psychiatric testimony obtained by the defense from a psychiatric examination of the defendant, the defense constructively puts the defendant himself on the stand and therefore the defendant is subject to psychiatric examination by the State in the same manner.

Battie v. Estelle, 655 F.2d 692, 702 n. 22 (5th Cir. 1981) (citations omitted).[14]

Applying the Court's analysis in the foregoing cases to the instant case, it is clear that Powell's Fifth Amendment challenge to Dr. Coon's testimony cannot stand. Here, Powell's own expert, Dr. Psikoff, raised the temporary insanity issue at the punishment phase of trial. 33 SR 431, 458-59, 495-96, 514-

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[14] This Court noted in *Powell* that its earlier decisions in *Estelle* and *Buchanan* provided support for the Fifth Circuit's holding in *Battie* regarding the Fifth Amendment waiver. *Powell*, 492 U.S. at 684.

15, 519, 523.[15] Dr. Coons merely rebutted this testimony with his own testimony that Powell was sane at the time of the murder. 34 SR 862-66. Thus, Powell had waived any Fifth Amendment right not to have Dr. Coons use his statements against him by injecting the issue of his temporary insanity into the trial. Powell should not be allowed to hide behind the Fifth Amendment in order to enable him to introduce self-serving statements that he was insane at the time of the murder and at the same time prohibit the state from rebutting such evidence. If Powell himself had testified during punishment that he was insane at the time of the murder, he clearly would have been subject to cross-examination regarding his prior statements indicating just the opposite. Powell's use of Dr. Psikoff to present the exact same type of evidence should not allow Powell to bypass the state's right to rebut such evidence. Accordingly, Powell has waived his right to complain of any Fifth Amendment violation.

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[15] The fact that defense counsel requested to have the temporary insanity instructions removed from the punishment phase charge is not determinative of this issue. Dr. Psikoff repeatedly testified to Powell's temporary insanity due to voluntary intoxication. 33 SR 431, 458-59, 495-96, 514-15, 519, 523. If this testimony had remained unrebutted, defense counsel undoubtedly would have left the temporary insanity instructions in place. However, during defense rebuttal, Dr. Psikoff admitted that Powell had told him he shot the officer, had drugs in the car, and did not want to be arrested, 34 SR 897; that Powell certainly knew the man was a police officer, 34 SR 898; that Powell "was certainly sane at the time[,]" 34 SR 914-15; and that Powell killed the policeman because he did not want to go to jail. 34 SR 915. In light of this testimony from Powell's own expert, a temporary insanity instruction was useless to the defense and could only serve to support the state's argument that Powell had interjected the temporary insanity issue into the trial. The defense thereafter moved to abandon the temporary insanity instruction from the court's punishment phase charge. 35 SR 973.

B. The presence of a large number of uniformed officers in the courtroom during the final arguments at the punishment phase of Powell's trial does not entitle him to a new trial.

Powell next complains that during the final arguments at the punishment phase of his trial, the courtroom was filled with uniformed police officers wearing purple strips of tape over their badges as a sign of mourning for Officer Ablanedo.

The problem, again, with Powell's argument is that, even assuming all the facts as he states them,[16] he has already received all the relief to which he is entitled by the Court of Criminal Appeals' remand for resentencing. There is no conceivable way that heavy police presence during the punishment phase proceedings could have affected the jury's previous guilty verdict in the guilt-innocence phase proceedings.

Secondly, Powell's counsel never objected at trial to the alleged "intimidating" atmosphere created by the large number of police officers in the courtroom. Despite Powell's assertions that the "demonstration" was "behind counsel's back," petition at 11, the record clearly demonstrates that counsel was aware of the large number of police officers the entire time and never

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[16] However, the state does not agree with Powell's recitation of the facts. There was absolutely no competent evidence introduced at the hearing on the motion for new trial that the presence of the police officers was planned or "orchestrated". Defense witness David Van Os, a friend of Powell's, speculated that "it seems as if" the officers were dispatched to the courtroom because they all showed up at the same time. 36 SR 6-9. Defense counsel himself testified that he heard from a lady that works at the television station that there had been a dispatch for the officers to there. 36 SR 20. A hearsay objection to this testimony was immediately sustained. 36 SR 20. No attempt was made to provide the court with any direct evidence that police were dispatched to the courtroom, *e.g.*, testimony from the lady, police dispatch records, etc. On the other hand, the prosecutor testified under oath that he was unaware of any dispatch being made for the police officers to attend closing arguments. 36 SR 12. He further testified that he did not send for the police officers, nor personally requested any of them to be there to influence the jury. 36 SR 13.

objected. Indeed, counsel acknowledged as much during his final argument:

> I don't know whether it's coincidence that there are a lot of people in the courtroom today, and I'm not going to argue that there are a lot of police officers here in the courtroom, and that's supposed to influence you in some way. My mother is here. I hope she doesn't intimidate you.

35 SR 1015.

Furthermore, it was brought out at the motion for new trial that the officers arrived in the courtroom before the jury was brought in for final arguments. 36 SR 16, 21, 24, 45. Defense counsel was fully aware of their presence yet never made a record objection either before or after the jury was brought in. 36 SR 13, 16, 24. Further, it is unconvincing to argue that defense counsel as experienced as Mr. DeGuerin would forget or overlook the need to object to a "lynch-mob atmosphere." The fact that he chose not to object supports the notion that the atmosphere was not, in fact, so intimidating as to affect the jury's deliberations.

Furthermore, Powell cites no cases in which this Court has held that the voluntary presence of a large number of police officers, at the punishment phase of a capital murder trial in which the victim was a fellow police officer, violates a defendant's right to a fair trial. *Turner v. Louisiana*, 379 U.S. 466 (1965), *Irvin v. Dowd*, 366 U.S. 717 (1961), *Sheppard v. Maxwell*, 384 U.S. 333 (1966) and *Moore v. Dempsey*, 261 U.S. 86 (1923) are all distinguishable on their facts.

Finally, any suggestion by Powell that this alleged error could have affected the trial court's decision to render judgment on the jury's guilty verdict is absurd. As demonstrated above, such procedures are not even possible under Texas law. Furthermore, the trial court was given an opportunity to direct a verdict for Powell at the conclusion of the guilt-innocence phase evidence and prior to the punishment phase proceedings, and promptly declined to do so. 30 SR 1096. Finally, even if the alleged Fifth and Sixth Amendment errors previously discussed

could have impacted the trial court's view of the evidence relating to Powell's guilt or innocence, which the state strongly denies, it is inconceivable to argue that the courtroom presence of a large number of police officers at the punishment phase of a trial could persuade a court that the defendant it thought was innocent was actually guilty. This claim is frivolous.

CONCLUSION

For the foregoing reasons, the state respectfully requests that the petition for writ of certiorari be denied.

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